This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

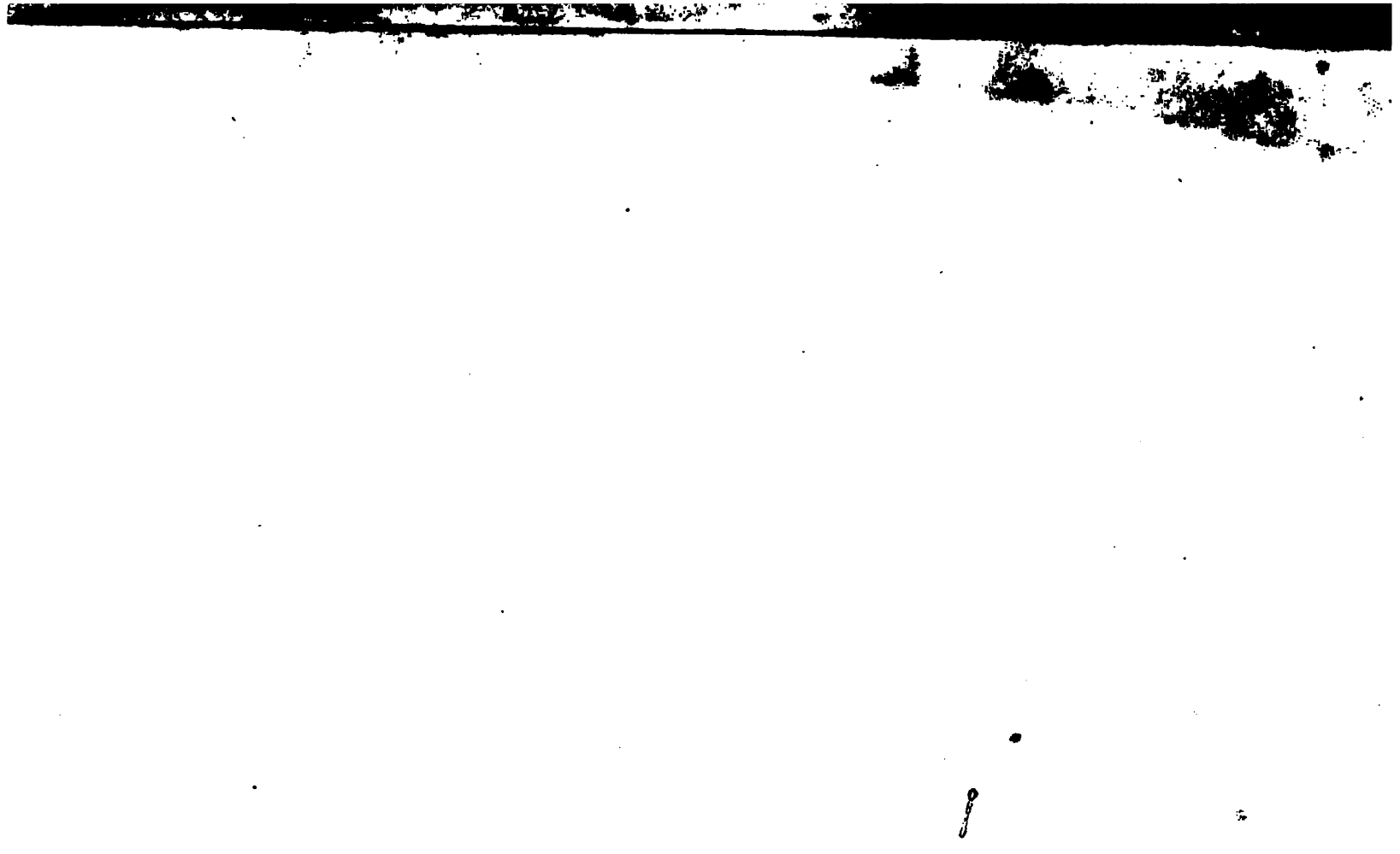
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

8vo Jun.
a. 17. 8

Ow.U.K. 1
100
L20 4



CASES

IN

CROWN LAW.

THE FOURTH EDITION.

W. WOODFALL, PRINTER,
ANGEL COURT, SKINNER STREET, LONDON.

CASES

IN

CROWN LAW,

DETERMINED BY

THE TWELVE JUDGES;

BY

THE COURT OF KING'S BENCH;

AND BY

COMMISSIONERS OF OYER AND TERMINER, AND GENERAL GAOL DELIVERY;

FROM THE

FOURTH YEAR OF GEORGE THE SECOND, 1730,

TO THE

FIFTY-FIFTH YEAR OF GEORGE THE THIRD, 1815.

BY THOMAS LEACH, ESQ.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

THE FOURTH EDITION,

WITH CORRECTIONS AND ADDITIONS.

IN TWO VOLUMES.

VOL. II.

LONDON:

PRINTED FOR J. BUTTERWORTH AND SON; T. CADELL AND W. DAVIES; J. WALKER; W. CLARKE AND SONS; R. PHENEY; E. JEFFERYS; AND J. COOKE, ORMOND QUAY, DUBLIN.

1815.

CASES

IN

CROWN LAW

DETERMINED BY THE JUDGES

FROM

THE FOURTH YEAR OF GEO. II. 1730,

TO

THE PRESENT TIME.

1791.

THE KING *against* ROBERT GODDARD AND SARAH FRASER. CASE CCXLV.

On the statute of 3 & 4 Will. & Mary, c. 9. two persons cannot be convicted on the same indictment, unless a joint contract be stated.

AT the Old Bailey in April Session 1791, *Robert Goddard* and *Sarah* the wife of *Robert Fraser* were tried before MR. BARON HOTHAM on the statute of 3 & 4 William and Mary, c. 9.

THE indictment charged, "That they, on the 25th February 1791, one bed-quilt of the value of five shillings, one linen sheet of the value of twelve pence, &c. of the goods and chattels of *George Cobb* (the same goods and chattels being in a certain lodging-room in the dwelling-house of the said *George Cobb*, let by contract by the said *George Cobb* to the said *Robert Goddard*, and to be used by the said *Robert Goddard* and *Sarah Fraser* with the lodging aforesaid), then and there being, feloniously did steal, take, and carry away, against the form of the statute."

IT appeared in evidence from the testimony of *Elizabeth Cobb*, the wife of the prosecutor, that the prisoner *Goddard*

1791.

GODDARD AND FRASER'S CASE.

came, on the day laid in the indictment, to look at and take the lodgings; but on his saying that he was a married man, she refused to let the lodgings to him, and desired him to send his wife. The other prisoner *Sarah Fraser* accordingly came to *Cobb*'s house, in the character of *Goddard*'s wife, to look at the lodgings; and with her the contract for them was made.

MR. BARON HOTHAM told the Jury, that on this evidence they must acquit the prisoners, for that the evidence fatally varied from the charge laid in the indictment. The indictment stated, that the lodgings were let to *Robert Goddard*, but the evidence proved that they were let to *Sarah Fraser*.

THE prisoners were accordingly acquitted.

CASE CCXLVI.

THE KING *against* JOHN STEVENSON.

If a prisoner, indicted for a *felony*, with whom the Jury are charged, be by sudden illness during the trial, rendered incapable of remaining at the bar, the Jury may be discharged from the trial of that indictment, and the prisoner, on his recovery, tried before another Jury.

AT the Old Bailey in June Session 1791, *John Stevenson* was indicted before MR. JUSTICE ASHHURST, present MR. BARON PERRYN, for stealing a quantity of wearing-apparel, the property of *Thomas Thomas*.

THE prisoner had been arraigned before the *second Middlesex Jury*, and they were charged to try him.

THE evidence on the part of the Crown was nearly closed, when the prisoner was suddenly seized with a fit, which, by the report of the surgeon who was called in, rendered him incapable of being again brought to the bar for trial.

THE COURT accordingly discharged the Jury from this trial (*a*), and proceeded to try the other prisoners.

THE ensuing morning *Stevenson*, being sufficiently recovered, was again put to the bar, and the *first Middlesex Jury* was charged to try him; and on hearing the evidence they found him GUILTY.

(*a*) See the case of Eliz. Meadowes, Foster's Crown Law, 76. Rex *v.* Ann Scalbert, *post*, Summer Assize, York, 1794; and Rex *v.* William Edwards, Monmouth Lent Assizes, 52 Geo. III. before Mr. Baron Wood; and afterwards determined by the JUDGES in the Exchequer Chamber acc: 3 Campbel's Rep. 207.

1791.

THE KING *against* MARY GRAHAM. CASE CCXLVII.

AT the Old Bailey in July Session 1791, *Mary Graham* was convicted of grand larceny before MR. JUSTICE BULLER, present MR. JUSTICE WILSON, and MR. SERJEANT ROSE, Recorder of London.

A Peer of *Ireland* cannot sue or prosecute by his *name of dignity*; but must be described by his *proper name*, with the addition of his *degree* and *title* (*a*). Salk. 451.

THE indictment was as follows:—"MIDDLESEX. The Jurors, &c. upon their oaths present, that *Mary Graham*, late of the parish of St. George's, Hanover-square, in the county of Middlesex, spinster, on the 14th June 1791, with force and arms, at the parish aforesaid, in the county aforesaid, two silver table spoons, of the value of twenty shillings, of the goods and chattels of JAMES HAMILTON, ESQUIRE, *commonly called* EARL OF CLANBRASSIL in the kingdom of *Ireland*, then and there being found, then and there feloniously did steal, take, and carry away," &c.

IT appeared in evidence, by the testimony of a witness who had lived four years in the capacity of valet to the prosecutor, that the father of the prosecutor had been dead many years, and that the prosecutor was generally understood to be his heir, and had, since that event, borne the title of *Earl of Clanbrassil*.

THE learned Judge, upon this evidence, conceived that the indictment was erroneous in stating the prosecutor to be *commonly called* EARL OF CLANBRASSIL, for that as he was legally possessed of that title in his own right, it became his *name of dignity*, by which name he ought to be described; for that this was distinguishable from the case where a Duke or an Earl's son holds the title of Lord by courtesy: there, in describing such a person, in legal proceedings it is usual

(*a*) But see 39 & 40 Geo. III. c. 77. by which Great Britain and Ireland are united.—Four Lords spiritual of Ireland by rotation of Sessions and twenty-eight Lords temporal elected for life, by the Peers of Ireland, shall sit in THE HOUSE OF LORDS; and all the Lords of parliament on the part of Ireland spiritual and temporal sitting in the House of Lords *shall have the same rights and privileges respectively as the Peers of Great Britain.*

1791.

GRAHAM'S CASE.

to add "*commonly called*," *&c.* to his family name; but that in the present case the prosecutor did not hold the title of *Earl of Clanbrassil* by courtesy, but by law; and in declarations in civil suits it was the constant practice to describe the person by his name of dignity. The indictment therefore ought to have been *James Hamilton*, Esquire, Earl of *Clanbrassil*, in the kingdom of *Ireland*; and not *James Hamilton*, Esquire, *commonly called* Earl of *Clanbrassil*, *&c.* But it being stated that the practice was to use the present form, the case was saved for the opinion of the TWELVE JUDGES.

MR. BARON PERRYN, in the December Sessions following, ordered the prisoner to be put to the bar, and after stating the case as above described, delivered the opinion of the JUDGES to the following effect:—Eleven of the TWELVE JUDGES assembled to consider of this case, and they are unanimously of opinion, that the present indictment is not bad in its present form. The authorities by which this opinion is supported are, the case of *Lord Sanquhar*, a Baron of *Scotland* (1), who, in the reign of *James* the First, was indicted as an accessary before the fact in the murder of *John Turner*. The indictment stated, that one *Robert Creighton*, late of the parish of St. Margaret, in the county of Westminster, *Esquire*, not having the fear of God before his eyes, &c. &c. On this case a question was propounded to the Judges, In what manner *Lord Sanquhar*, being an ancient Baron of *Scotland*, should be tried? And it was answered, that none within this realm of *England* is accounted *a Peer of the realm* but he who is *a Lord of Parliament* of *England*; for every subject is either a Lord of Parliament or one of the Commons, and *Lord Sanquhar* is not a Lord of Parliament within this kingdom, and therefore should be tried by the Commons of the realm, viz. Knights, *Esquires*, and others of the Commons. Also, in *Sir Edward Coke*'s Exposition of the Statute of *Additions* (2), the 1 Hen. V. c. 5. which ordains, "that in every indictment on which process of outlawry lies, *additions* shall be made to the name of the defendants, of their estate, or degree, or mystery, and of the

(1) 9 Co. Rep. 119.

(2) 2 Inst. page 667.

1791.

GRAHAM'S CASE.

town or hamlets, or places and counties, &c." it is said, that all Dukes, Marquises, *Earls*, Viscounts and Barons of *other nations*, or who are not Lords of the Parliament of *England*, are called *Esquires*, except they have been created *Knights*; and that the sons of all the Peers and Lords of Parliament of *England* are in law, during the life of their fathers, called *Esquires*, and must be so named. In *Hawkins*'s Pleas of the Crown (1), in treating of what shall be considered a sufficient addition of the estate and degree of *the appellee* in an appeal, he says, that "although it seems to be admitted by the Year-Book of Cases (2) in the reign of Henry the Sixth, that the Bishop of an Irish diocese may be as well described by the addition of his bishoprick, as an English bishop may by the addition of an English one; yet it seems clear, that no one can be well described by the addition of a *temporal dignity* in *Ireland*, or any other nation besides our own, because no such dignity can give a man a higher title here than that of *Esquire*." The Judges therefore, upon these authorities, are clearly of opinion, that "JAMES HAMILTON, *Esquire*," is a sufficient description of the person and degree of the prosecutor of the present indictment; and that the subsequent words, "commonly called Earl of Clanbrassil in the kingdom of Ireland," may be rejected as *surplusage*. But they conceived, that the more correct and perfect mode of describing the person of the prosecutor would have been, "JAMES "HAMILTON, *Esquire*, Earl of Clanbrassil in the kingdom "of Ireland;" and as this more perfect description appears upon the face of this indictment, by considering the intervening words "*commonly called*" as surplusage, they are of opinion, that the indictment is not bad, and that the conviction of the prisoner is legal.

(1) 2 Hawk. page 271, pl. 109.

(2) 21 Hen. 6. pl. 4. See also Theolal's Dig. book vi. c. 15. s. 8.

THE KING *against* HARRIS.

CASE CCXLVIII.

Disobeying the orders of the Privy Council with respect to the performance of *quarantine* is an offence at common law.

THE statute 26 Geo. II. c. 6. s. 1. enacts, "That all ships and vessels arriving, and all persons, goods, and merchandises whatever, coming into any port or place within Great

1791.

HARRIS'S CASE.

Britain, &c: from any place from whence the Privy Council shall judge it probable that the infection of the plague may be brought, shall make quarantine in such place, for such time, and in such manner, as hath been or shall, from time to time, be directed by the Privy Council, and notified by proclamation, or published in the Gazette: AND THAT, until such ships or vessels, persons, goods, and merchandises, or any of them, shall have respectively performed and be discharged from such quarantine, no such person, goods, or merchandises, or any of them, shall come or be brought on shore, or go or be put on board any other ship or vessel, except by license from the Privy Council: AND, THAT all such ships and vessels, and the persons or goods coming or imported in, or going or being put on board the same, and all ships, vessels, boats, and persons, receiving any goods or persons out of the same, shall be subject to the orders of the Privy Council."

THE Privy Council in the month of July 1782, made and published an order, " That if any pilot or other person shall go on board any ship or vessel obliged to perform quarantine, such pilot or other person shall perform quarantine in like manner as any person coming in such ship or vessel shall be obliged to perform the same."

THE defendant was a pilot at *Bristol*, and on the 8th June 1788, went on board a ship called *the Stephen*, then under orders to perform quarantine, in order to pilot her into the port of *Bristol*, but in six days afterwards, and three days before the time of quarantine was expired, he quitted *the Stephen* and went on board another ship not obliged to perform quarantine in Bristol Channel, but did not go on shore until after the term of *the Stephen*'s quarantine was completely expired.

THE ATTORNEY GENERAL filed an information against him for this offence; charging in the first count, that he went on board *another vessel*; and, in a second count, that he went *on shore* before the term of quarantine was expired, concluding, against the form of *the statute*.

THE JURY, on the trial before LORD KENYON, *Chief Jus-*

tive, at the Sittings after Michaelmas Term 1790, found the defendant GUILTY. 1791.

HARRIS'S CASE.

IN the Hilary Term following, the defendant was brought up to receive the Judgment of the Court of King's Bench.

A pilot who goes on board a ship under *quarantine*, and quits her before the quarantine expires, is not within the penalties of 26 Geo. II. c. 6. s. 5.

A QUESTION was raised, Whether this information could be sustained as for an offence at *Common Law*, and the defendant liable to a discretionary punishment? or, whether a particular mode of proceeding and punishment had not been prescribed by 26 Geo. II. c. 6. s. 5. which enacts, "That if any commander, master, or other person, having charge of any ship or vessel liable to perform quarantine, shall himself quit, or shall knowingly permit or suffer any seaman or passenger coming in any such ship or vessel to quit such ship or vessel, by going on shore, or by going on board any other ship, boat, or vessel, before such quarantine shall be fully performed, every such commander, master, or other person having charge of such ship or vessel, shall for every such offence forfeit five hundred pounds, one moiety to the King, &c. AND THAT, if any person shall so quit such ship or vessel, by going on shore, or by going on board any other ship or vessel, every such person shall suffer six mouths' imprisonment, and forfeit the sum of two hundred pounds, one moiety to the King, the other moiety to him who will sue for the same by action of debt, bill, plaint, or information," &c. (*a*).

THE COURT was clearly of opinion, That disobeying the order thus made by the Privy Council was an offence at Common Law, and compared it to the case of *Rex* v. *Robinson* (1), where an indictment for disobeying an order of maintenance was held good, notwithstanding the statute 43 Eliz. c. 2. s. 7. enacts, That fathers, &c. shall maintain their children in such manner as the Justices shall direct, and annexes a penalty of twenty pounds a month, to be recovered in a summary way; for it was held as a clear and established principle of law, that where a statute creates a new offence by prohibiting and making unlawful any thing which was law-

(1) 2 Burr. 799

(*a*) For further regulations respecting the performance of quarantine, see 39 and 40 Geo. III. c. 80. 45 Geo. III. c. 10. 46 Geo. III. c. 98. 50 Geo. III. c. 20. and the 51 Geo. III. c. 46.

1791.

HARRIS'S CASE.

ful before, and appoints a specific remedy against such new offence by a particular sanction, and particular mode of proceeding, that particular mode of proceeding must be pursued and no other; but that where the offence was antecedently punishable by a common law proceeding, and the statute prescribes a particular remedy by a summary proceeding, either method may be pursued.

BUT it was determined in the present case, that the 26 Geo. II. c. 6. s. 5. relates entirely to the captain, seamen, and passengers on board such ship or vessel, and does not reach the case of the present defendant, who is not to be considered in either of those characters.

THE defendant was accordingly sentenced to one year's imprisonment.

CASE CCXLIX.

THE KING *against* BENJAMIN LAMBE.

A voluntary confession of felony made by a prisoner on his examination before a magistrate, and *reduced by the magistrate into writing*, may be given in evidence on the trial, though the magistrate has neglected and the prisoner has refused to sign it.

AT the Summer Assize for the county of *Surry*, holden at Croydon 18th August 1791, *Benjamin Lambe* was indicted, for that he on the 10th July 1791, the dwelling-house of *Charles Hockstetter* burglariously did break and enter, and five silver tea-spoons, &c. the goods and chattels of the said *Charles Hockstetter*, feloniously and burglariously did steal, take, and carry away.

IT was clearly proved, that the property in the indictment, which was to a large amount, was taken by the prisoner out of the prosecutor's house. It was also proved, that on the 13th July the prisoner was apprehended, and taken before *Sir Sampson Wright*, at THE PUBLIC OFFICE in *Bow-Street* to be examined; that *Lavender*, the clerk, took his examination in writing, pursuant to the statute of Philip & Mary; that he afterwards read it carefully over to him; that the prisoner replied, "*It is all true enough;*" but that upon the clerk's requesting him to sign it, he said, "*No; I would rather decline that;*" and that in fact this examination, which contained a full and voluntary confession of the larceny, was not signed either by *the prisoner* or by *the magistrate*.

THE COUNSEL *for the prisoner* objected, that as the statute 2 & 3 Philip and Mary, c. 10. requires, "That every Justice

1791.

LAMBE'S CASE.

before whom any person shall be brought for felony, or for suspicion thereof, before he shall commit or send such prisoner to ward, shall take the examination of such prisoner, and information of those that bring him, of the fact and circumstances thereof; and the same shall *put in writing* within two days after the said examination, and the same shall certify in such manner and form as if such prisoner had been bailed;" and as the statute 1 & 2 Philip and Mary, c. 31. enacts, "That the two Justices who shall bail any person arrested for manslaughter or felony, shall certify the bailment in writing, subscribed or *signed with their own hands;* and that they shall take the examination of the prisoner in writing, and certify the same, together with the bailment, at the next general gaol delivery;" it was necessary that the examination should be authenticated by the signatures both of the prisoner and examining magistrate, and that as these ceremonies were omitted in the present case, the confession thus irregularly returned could not be read in evidence against the prisoner; and he cited *Gilbert's Law of Evidence*, 137. where it is said, that "the examination and confession, *subscribed by an offender* before a Justice of Peace, is good evidence against him (*a*)."

MR. JUSTICE WILSON, who tried the prisoner, admitted the examination to be read; and the Jury found the prisoner GUILTY, on the statute 12 Ann. c. 7. of stealing in the dwelling-house to the amount of forty shillings.

THE judgment however was respited, and the case saved for the opinion of THE TWELVE JUDGES, whether this examination was admissible evidence?

(*a*) At the Spring Assizes at Worcester in the year 1793, one *Bennet* was tried before MR. JUSTICE WILSON on an indictment for felony: the prisoner had made a free and voluntary confession of his guilt while under examination before the committing magistrate, who took the examination in writing, which he read over to the prisoner and desired him to sign it, but which he refused to do, although he at the same time acknowledged that he was guilty of the offence. The Counsel for the prosecution offered to give this acknowledgment of guilt in evidence; but the learned Judge refused to receive it, saying that it was competent to a prisoner under such circumstances to retract what he had said, and to say that it was false; and that in the present case the prisoner had retracted in time.

1791.

LAMBE'S CASE.

Mr. Justice Grose, at the ensuing Summer Assizes for the county of *Surry*, delivered the opinion of the Judges to the following effect:—The question referred to the opinion of the twelve Judges was, whether the examination containing a confession of the prisoner's guilt, not being signed either by *the prisoner* or *the magistrate*, is admissible evidence in point of law. The general rule respecting this species of testimony is, that a free and voluntary confession made by a person accused of an offence is receivable in evidence against him, whether such confession be made at the moment he is apprehended, or while those who have him in custody are conducting him to the magistrates, or even after he has entered the house of the magistrate for the purpose of undergoing his examination. But in the present case, the confession of the prisoner was made not only in the presence of the magistrate, but while he was undergoing a judicial examination; which examination was regularly reduced into writing, read deliberately over to the prisoner, and admitted by him to be true; but which, notwithstanding such admission, he refused to sign. On these circumstances it was contended at the trial, that as this confession was made on an examination taken in pursuance of the statutes 1 & 2 Philip and Mary, c. 13. and 2 & 3 Philip and Mary, c. 10. it could not be received in evidence, because it was not signed; those statutes impliedly requiring, that such examination should be so authenticated. It is therefore important to the true determination of the present question to inquire, First, Whether such an examination or paper-writing as this is would have been admissible evidence previous to the passing of those statutes? and Secondly, if it be admissible at common law, whether those statutes have destroyed its admissibility on account of its not being signed either by *the magistrate* or *the prisoner?* First, then, to consider this question as it is governed by the rules and principles of the common law. Confessions of guilt made by a prisoner to any person at any moment of time, and at any place, subsequent to the perpetration of the crime and previous to his examination before the magistrate, are at common law admissible in evidence as the highest and most

1791.

LAMBE'S CASE.

satisfactory proof of guilt, because it is fairly presumed that no man would make such a confession against himself, if the facts confessed were not true (1). It may however be said, that this rule only applies to confession by *parol*, and not to confession, as in the present case, reduced into *writing* and afterwards admitted by *parol* to be true; but surely, if what a man says, though not reduced into writing, may be given in evidence against him, *a fortiori* what he says, when reduced into writing, is admissible; for the fact confessed being rendered less doubtful by being reduced into writing, it is of course intitled to greater credit; and it would be absurd to say, that an instrument is invalidated by a circumstance from which it derives additional strength and authenticity: and for this reason it is clear, that the present confession having been taken by a magistrate under a judicial examination, can be no objection to receiving it in evidence, for it gains still greater credit in proportion to the solemnity under which it was made. The conclusion from these observations is, that at common law every fact which may be proved against a prisoner by *parol testimony*, may also, when reduced into writing and admitted by the prisoner, be proved by *the paper* containing the written evidence of such fact.

(1) Hard. 139, 140. Gilb. Law of Evid. 137.

SECONDLY, It remains to consider, whether this paper-writing, which is clearly receivable in evidence at common law, is rendered inadmissible by the statutes 1 & 2 Philip and Mary, c. 13. and 2 & 3 Philip & Mary, c. 10. The statute 1 & 2 Philip and Mary, c. 13. recites, That it was ordained by the statute 3 Hen. 7. c. 3. that no prisoner arrested for felony should be bailed by one Justice, but by the whole Justices, or at least two of them; but that, since the making of the said statute, one Justice of the Peace, in the name of himself and one other of the Justices' companions, not making the said Justice party or privy unto the case wherefore the prisoner should be bailed, had oftentimes, by sinister labour and means, set at large the greatest offenders; and, to hide their affection in that behalf, had signed the cause of their apprehension to be but only for *suspicion of felony*—and then it enacts, "That no Justice or Justices of the Peace shall let

1791.

LAMBE'S CASE.

to bail or mainprize any such person or persons which for any offence or offences by them, or any of them committed, be declared not to be replevied or bailed by the statute of *Westminster* the first."—AND THAT "Any person or persons arrested for manslaughter or felony, or suspicion of manslaughter or felony, being bailable by the law, shall not be let to bail or mainprize by any Justices of the Peace, if it be not in open session, except it be by two Justices of the Peace at the least, the same Justices to be present together at the said bailment or mainprize, which bailment or mainprize they shall certify *in writing*, subscribed or *signed with their own hands*, at the next general gaol delivery to be holden within the county where the said person or persons shall be arrested or suspected." And then it goes on thus:—"And that the said Justices, when any such prisoner is brought before them for any manslaughter or felony, before any bailment or mainprize, shall take the examination of the said prisoner, and the information of them that bring him, of the fact and circumstances thereof; and the same or as much thereof as shall be material to prove the felony, *shall put in writing* before they make the same bailment; which said *examination*, together with the said *bailment*, the said Justices shall *certify* at the next general gaol delivery to be holden within the limits of their commission (*a*)." It is evident, from the whole scope

3 Edw. 1. c. 15.

(*a*) The statute goes on to enact, "That every Coroner, upon any inquisition before him found, whereby any person or persons shall be indicted for murder or manslaughter, or as accessary or accessaries to the same before the murder or manslaughter committed, shall put in writing the *effect of the evidence* given to the Jury before him, being material; and as well the said Justices as the said Coroner shall have authority by this Act to bind all such by recognizance or obligation, as do declare any thing material to prove the said murder or manslaughter, offences or felonies, or to be accessary or accessaries to the same as is aforesaid, to appear at the next general gaol delivery to be holden within the county, city, or town-corporate, where the trial thereof shall be, then and there to give evidence against the party so indicted at the time of his trial; and shall certify, as well the same evidence as such bond or bonds in writing as he shall take, together with the inquisition or indictment before him taken and found, at or before the time of his said trial thereof to be had or made. And likewise the said Justices shall certify all and every such *bond* taken before

1791.

LAMBE'S CASE.

of this statute, that the only intention of the Legislature in passing it was to prevent Justices of Peace from admitting offenders improperly to bail. The statute 2 & 3 Philip and Mary, c. 10. recites that the former statute 1 & 2 Philip and Mary, c. 13. "does not extend to such prisoners as shall be brought before any Justice of Peace for manslaughter or felony, and by such Justice shall be *committed* on the suspicion of such manslaughter, felony, &c. and not bailed; in which case *the examination* of such prisoner, and of such as shall bring him, is as necessary, or rather more, than where such prisoner shall be *let to bail.*" And therefore it enacts, "That the Justice or Justices before whom any person shall be brought for manslaughter or felony, or for suspicion thereof, before he or they shall commit or send such prisoner to ward, shall take the examination of such prisoner, and the information of those that bring him, of the fact and circumstances thereof; and the same, or as much thereof as shall be material to prove the felony, shall *put in writing* within two days after the said examination; and the same *shall certify in such manner and form*, and at such time as they should and ought to do, *if such prisoner*, so committed or sent to ward, *had been bailed*, or let to mainprize. And that the said Justices shall have authority by this Act to bind all such by recognizance or obligation as do declare any thing material to prove the said manslaughter or felony against such prisoner as shall be so committed, to appear at the next general gaol delivery, &c. then and there to give evidence against the party; and that the said Justices shall certify the said *bond* taken before them, in like manner as they should and ought to certify the bonds mentioned in the 1 & 2 Phil. and Mary, c. 13." In this statute also the intention of the Legislature in passing it is clear and obvious. Its only object is to enable Justices

them, in like manner as before is said of *bailments* and *examination*, &c. provided that Justices of Peace and coroners within the city of *London* and the county of *Middlesex*, and in other cities, boroughs, and towns-corporate within this realm and *Wales*, shall within their several jurisdictions have authority to let to bail felons and prisoners, in such manner and form as they have been heretofore accustomed."

1791.

LAMBE'S CASE.

of the Peace to take such *information* (1), and to transmit what passes before the committing Magistrate to the Court of Oyer and Terminer, or Gaol Delivery, to enable the Judge and Jury before whom the prisoner is tried to see whether the offence is bailable, and whether the witnesses are consistent or contradictory in the evidence they give. These are the motives which seem to have urged the Legislature to pass these two statutes. There is not a single expression in either of them from which it is to be collected, that *the examination* was directed to be taken merely *as evidence* against the prisoner; nor, indeed, is *the examination* in practice ever given in evidence, as a matter so required by the statutes; but containing a detail of circumstances, taken under the solemnity of a public examination for a different purpose, it is more authentic on account of the deliberate manner in which it is taken; and when it contains A CONFESSION, is admitted, not by force of the statutes, but by the common law, as strong evidence of that fact. Consider for a moment what an absurdity would follow, if the *manner and form* in which a confession is reduced into writing were to be the ground of an objection against receiving the confession in evidence. The confession of a fact by the prisoner to the Constable, the moment before they entered the office of the Magistrate, might, on the *vivâ voce* testimony of the Constable, be given in evidence; but a confession made on the other side of the office-door, in the presence and hearing of the Magistrate, could not be given in evidence if reduced into writing, unless such writing were signed by the prisoner. A proposition which needs only to be stated to shew its weakness and absurdity! The Legislature has not, by even a remote expression in either of the statutes, signified an intention to alter the nature of evidence, or to prevent that from being received as evidence against a prisoner now, which was receivable as evidence before. The intention was merely to compel Justices of the Peace to return *the examination* of the prisoners, and *the information* of those who appeared against them, for the purposes, and very wise ones they are, apparent on the face of the statutes. As matter of future evidence it was not even

(1) For it is said by L.C.J. BRIDGEMAN, that Justices of the Peace were not enabled to take examinations at Common Law. Kely. 19.

1791.

LAMBE'S CASE.

in the contemplation of the Legislature. But at the time when these statutes passed, *the examinations* which they directed to be taken, became evidence, where they contained confessions, by operation of law, leaving all other confessions, good or bad, as they were before those statutes were made; and it is clear, that what a prisoner confessed before a Justice of the Peace, previous to the reign of Philip and Mary, if not induced by hope or extorted by fear, whether reduced into writing or not; or, if reduced into writing, whether signed or not, if admitted by the prisoner to be true, was and is as good evidence as if made in the adjoining room previous to his having been carried into the presence of the Justice, or after he had left him, or in the same room before the Magistrate comes, or after he quits it. Thus, as it seems to me, the point in question stands both at the common law, and upon the construction of the statutes; and authorities are not wanting to support the principle of this decision. In the case of *Rex* v. *Layer* (1), upon an indictment of high treason, tried at the bar of the Court of King's Bench before SIR JOHN PRATT, in the ninth year of George the First, the prisoner's confession before the Privy Council was admitted in evidence, although not signed by the prisoner. At the Lent Assizes for the county of *Stafford*, in the year 1790, one *Hall* and two others were tried and convicted on an indictment for burglary. The evidence was clear against the two others; but, excepting one or two slight circumstances, certainly not sufficient of themselves to have put *Hall* on his defence: the only evidence against him was his examination before the Magistrate, which was not taken in writing, either by the Magistrate or by any other person, but was proved by the *viva voce* testimony of two witnesses who were present, and which amounted to a full confession of his guilt. The case was saved and referred to the consideration of the JUDGES, whether this evidence of the confession was well received, and the prisoner legally convicted; and all the JUDGES, except MR. JUSTICE GOULD, were of opinion that the conviction was right (*a*).—*Hawkins* (2), in his Pleas of the Crown,

(1) 6 St. Tr. 229.

(2) Hawk. P.C. c. 46. s. 31.

(*a*) The prisoners in this case were tried before MR. SERJEANT ADAIR, who sat on the Crown side for MR. JUSTICE WILSON.—During the trial a

1791.

LAMBE'S CASE.

says, "It seems that the confession of the defendant himself, taken by the common law, or upon an examination before *Justices of the Peace*, in pursuance of the statutes of *Philip and Mary*, upon a bailment or commitment of felony; or taken by the common law upon an examination before a *Secretary of State*, or *other Magistrate*, for treason or other crimes not within those statutes; or the confession of the defendant himself, made in discourse with *private persons*, hath always been allowed to be given in evidence against the party confessing." As well, therefore, upon principle as upon precedent, a majority of the JUDGES are of opinion that the examination, or paper-writing, produced on the trial of the prisoner at the bar, was, under the circumstances of the case, well received in evidence, and that the prisoner is legally convicted.

SENTENCE of death was accordingly passed on the prisoner.

man of the name of *Tart* was among others produced, to prove that the prisoner *Hall* had desired him to apply to the Justice to admit him as a witness for the Crown; for that he had not entered the house, but had only stood at the door while the other two prisoners went up stairs to commit the felony. But MR. MANLEY, the prisoners' Counsel, objected, that as *this* confession was made with a view and under the hope of being thereby permitted to turn King's evidence, it was not admissible in evidence against the prisoners; and the learned JUDGE being of opinion that this was not a *voluntary confession*, the testimony of *Tart* was rejected.

CASE CCL.

THE KING *against* RICHARDSON.

A prisoner in custody on a charge of perjury is not dischargeable on the indictment being removed into the King's Bench; but if he had been on bail, such removal would have discharged the recognizance.

AN indictment for perjury was found against *Richardson* at THE OLD BAILEY; on which indictment a warrant issued, and *Richardson* was apprehended and committed to NEWGATE. The prosecutor afterwards removed the indictment by *certiorari* into the Court of King's-Bench.

KNOWLYS, *for the prisoner*, moved, in July Session 1791,

that as there was now no record before the Court, the prisoner might be discharged. 1791.

RICHARDSON'S CASE.

But Mr. Justice Buller said, that when once a prisoner is in legal custody for an offence, he must find sureties before he can be discharged; but if he had been admitted to bail, the removal of the indictment would have discharged his recognizance.

THE KING *against* GEORGE DINGLER. CASE CCLI.

At the Old Bailey in September Session 1791, *George Dingler* was tried before Rose, *Recorder*, present Mr. Justice Gould, on an indictment charging him with having murdered *Jane Dingler* his wife, at the parish of *St. Margaret's, Westminster*, in the county of *Middlesex*, on the 16th day of August 1791.

On the trial of an indictment for murder an *examination of the party wounded*, taken by a Magistrate at an infirmary to which the deceased had been taken for the purpose of receiving medical assistance, but *in the absence of the prisoner*, cannot be read in evidence as an examination taken pursuant to the statute 2 and 3 Phil. & Mary, c. 10.

It appeared in evidence, that the wounds, which were many in number, were inflicted on the 16th day of August, 1791, with a large clasp-knife; and that the deceased was taken on the same day to the *Westminster Infirmary*, where she languished until the 28th of August, and then died of the wounds she had received. The prisoner was immediately apprehended, and taken before *Robert Abingdon*, Esq. a Magistrate for *Westminster*, who took the examination of the prisoner, and the information of the witnesses who then attended, pursuant to the statute of *Philip and Mary*; and thereupon he committed the prisoner to take his trial at the next gaol delivery. On the ensuing day, *viz.* on the 17th August, Mr. *Abingdon*, on the request of the Parish-officers, attended Mrs. *Dingler* at the infirmary, and took her deposition upon oath of the facts and circumstances which had attended the outrage committed upon her, as far as she could recollect them; which depositions he reduced into writing, read them over to her with great deliberation, and, after seeing her set her mark to them in testimony of their truth, he signed them himself. At the time these depositions were taken the deceased was in a state of

But *quære*, If the party was in apprehension of approaching dissolution, whether it may not be read as a dying declaration *in extremis*? See 1 East, 356.

1791.

DINGLER'S CASE.

mind perfectly composed, although it appeared that her death was inevitable and approaching, and that she entertained some apprehension of the danger of her situation.

GARROW, *for the prisoner*, objected to the depositions thus taken being read in evidence, either as the *dying declaration* of a party conscious of approaching dissolution (*a*) or as a deposition taken pursuant to the statutes Philip and Mary; as it was not one of those examinations which the law authorizes the Court to receive in evidence. The 2 & 3 Phil. and Mary, c. 10. recites, that the 1 & 2 Phil. and Mary, c. 12. (which directs Justices, before they shall bail persons brought before them on a charge of manslaughter or felony, to take their examination in writing), did not extend to such prisoners as should be brought before and committed by such Justice for the suspicion of such manslaughter or felony; and enacts, "That such Justice or Justices, before whom any person shall be brought for manslaughter or felony, or for suspicion thereof, before he or they shall commit or send such prisoner to ward, shall take the examination of such prisoner, and information of those that bring him, of the fact and circumstances thereof, and the same, or so much thereof as shall be material to prove the felony, shall put in writing," &c. The Magistrate, therefore, is only authorized to take an examination of the person brought before him, and of those who bring him: this is the course which the law has prescribed to the Magistrate on these occasions; and when this course is pursued, the prisoner may have, as he is entitled to have, the benefit of cross-examination; but in the course which has been pursued by Mr. *Abingdon*, as the prisoner was not present, no judicial examination has been taken, as he could not have the benefit of cross-examination. The examination of the prisoner, and the deposition of the witnesses, might perhaps have been legally taken by Mr. *Abingdon* at the *Westminster Infirmary*, provided, in so doing, he had followed the directions of the statutes; and if they had been so taken, they might have been read. The authority of the Magistrate in

(*a*) See the Case of Rex *v.* Thomas John, Carmarthen Spring Assizes 1790, 1 East, P. C. 357, and *ante*, page 504, *notis*.

1791.

DINGLER'S CASE.

such cases grows out of the statute; it is commensurate with the terms of it; and therefore it is utterly impossible, *unless the prisoner had been present*, that depositions thus taken can be read; and he cited the case of *Rex* v. *Woodcock* (1).

(1) *Ante*, p. 500. Case 231.

FIELDING, *for the Crown*, admitted that this was not such an examination of a person under apprehension of immediate death as would, on that principle, authorize the production of it in evidence; but he contended, that although it was not taken strictly in pursuance of the statutes of *Philip and Mary*, yet it was the best evidence that the nature of the case would afford, and therefore admissible.

THE COURT, on the authority of the case cited, admitted the objection, and refused to receive the examination in evidence (*a*).

(*a*) See Woodcock's Case, Old Bailey January Session 1789, and the Cases of Rex *v.* Wilbourn, Lincoln Assizes 1792; Thomas John's Case, Carmarthen Assize 1790; there stated, *ante*, page 154, *notis*.

THE KING *against* WILLIAM PELFRYMAN AND JAMES RANDAL.

CASE CCLII.

AT the Old Bailey in October Session 1791, *William Pelfryman* and *James Randal* were indicted for that they, on the 5th day of November, &c. "in the King's highway, therein and upon one *John Mill*, in the peace of God and our said Lord the King, then and there being, *did make an assault*, and him the said *John* in corporeal fear and danger of his life, in the King's highway aforesaid, then and there *feloniously did put*, and one metal watch, &c. of the goods and chattels of the said *John Mill*, from the person and against the will of the said *John Mill*, in the King's highway aforesaid, then and there feloniously and violently did steal, take, and carry away," &c.

An indictment for a highway robbery must state that the *assault was feloniously made* with an offensive weapon. 2 East, 783.

THE Jury found the prisoners GUILTY.

GARROW, *for the prisoners*, moved in arrest of judgment,

1791.

PELERYMAN AND RANDAL'S CASE.

that the indictment was not sufficient in form to sustain the charge of a highway robbery; for that it is essential in describing this offence to state that *the assault* was feloniously made with an offensive weapon, which was not done in the present indictment; it only stated that the prosecutor was feloniously put in fear and danger of his life (*a*).

MR. JUSTICE HEATH and MR. BARON HOTHAM were both of opinion that the indictment was, for this reason, insufficient, and that it was impossible to give judgment upon this record for a highway robbery.

THE Grand Jury, therefore, not being discharged, the Court ordered the prisoners to be remanded to Newgate; and the prosecutor found another bill against them, on which they were convicted.

THE ensuing day this point was mentioned to several of the JUDGES; and upon the authorities 1 *Hawk. P. C.* ch. 34. s. 3. 1 *Hale, P. C.* 534. 3 *Inst.* 68. *Co. Ent.* 358. *b. West. Symb.* and *Office of Clerk of the Peace, Pulton*, 131, *b. pl.* 27. 2 *Roll. Rep.* 154. they were unanimously of opinion that the indictment was defective, and that the judgment had been properly arrested.

(*a*) Hale says that an indictment for robbery MUST run, "*Quod vi et armis apud B in regia via ibidem*, &c. 40*s. in pecuniis numeratis felonicè et violenter cepit a personâ*, and therefore if the word *violenter* be omitted in the indictment, or not proved upon the evidence, though it were *in alta via regia et felonicè cepit a personâ*, it is but larceny. 1 Hale, 534, for which he cites, Dyer, 284.

1792.

CASE CCLIII.

THE KING *against* JAMES CAMPBELL.

A Bank-note feloniously obtained in *the house* by a lodger *from his landlord*, under pretence of going to his banker to get it changed, is not a capital offence within the statute 12 Ann. c. 7. for where the taking is from *the person*, it is not a stealing in the *dwelling-house*. S. C. 2 East, 644.

AT the Old Bailey in January Session 1792, the prisoner was tried before SIR JAMES EYRE, Knt. Lord Chief Baron, present MR. JUSTICE BULLER and MR. JUSTICE WILSON, on the statute 12 Ann. c. 7. on an indictment charging,

1792.

CAMPBELL'S CASE.

"That *James Campbell*, late of the parish of *St. Martin in the Fields*, in the county of *Middlesex*, labourer; alias *John Campbell*, late of the same, labourer; alias *James Pitt*, late of the same, labourer; alias *John Douglas*, late of the same, labourer, on the 6th day of May, in the twenty-ninth year of the reign of George the Third, King of Great Britain, &c. with force and arms, at the parish aforesaid, in the county aforesaid, in the dwelling-house of *Charlotte Margaretta Adams*, widow, there situate, feloniously did steal, take, and carry away, one promissory note, called a Bank-note, of the value of twenty-five pounds (the said note at the time of committing the felony aforesaid being the property of the said *Charlotte Margaretta Adams*, the said sum of twenty-five pounds payable and secured by the said note being then due and unsatisfied to the said *Charlotte Margaretta Adams*, the proprietor thereof), against the statute, &c. and against the peace," &c.

It appeared in evidence, that the prosecutrix, Mrs. *Adams*, kept a common lodging-house in *Buckingham-street*, in *York-buildings*. In the month of May 1789, the prisoner, in the name of *Major* or *Colonel Campbell*, hired Mrs. *Adams*'s first-floor, and insinuated himself into her confidence and good opinion by telling her that he was well acquainted with her family, particularly with her brother, a young gentleman, then in his Majesty's service at *Gibraltar*. On the morning of the ensuing day, the Overseer of the parish called on Mrs. *Adams* for the payment of certain taxes, and she took the BANK-NOTE (*a*) of twenty-five pounds, as described in the indictment, from her pocket, and gave it to the Overseer to change; but he not having sufficient cash for that purpose, she gave it to her servant, *Ann Morgan*, who, by Mrs. *Adams*'s desire took it to the prisoner in the first-floor, with her mistress's compliments, requesting that he would give her change for it. The prisoner took out his purse, and examining its contents, told her that he had not gold enough about

(*a*) See Rex *v.* William Dean, July Session 1795, that Bank-notes are money within the meaning of 12 Ann. c. 7.

1792.

CAMPBELL'S CASE.

him for the purpose, but that he would go immediately to his banker's and get it changed; and he accordingly left the house with the Bank-note in his hand, but never returned. Mrs. *Adams* soon afterwards suspecting the prisoner's integrity, gave information of the circumstances at *Bow-street*; but he was not apprehended until the month of January 1791.

THE statute 12 Ann. c. 7. intitled, "An Act for the more effectual preventing and punishing *robberies* that shall be committed in dwelling-houses," recites, "That divers wicked and ill-disposed servants, and other persons, are encouraged to commit *robberies* in houses by the privilege, as the law now is, of demanding the benefit of their clergy;" and enacts, "That all and every person or persons that shall feloniously steal any money, goods or chattels, wares or merchandises, of the value of *forty shillings*, or more, *being in any dwelling-house*, or out-house thereunto belonging, although such house or out-house be not actually broken by such offender, and although the owner of such goods, or any other person or persons be or be not in such house or out-house, or shall assist or aid any person or persons to commit any such offence, shall be absolutely debarred of the benefit of clergy."

A QUESTION arose, Whether, under the circumstances of this case, the prisoner was debarred by the above statute of the benefit of clergy, the statute having been made to protect such property as might be *deposited in the house*, and not that which was on *the person* of the party?

THE Jury found the prisoner GUILTY; and the case was saved for the opinion of the JUDGES.

THE JUDGES were of opinion, that it was not a capital offence within the 12 Ann. c. 7. and the prisoner was sentenced to be transported for seven years.

See Owen's Case, O. B. July 1792, *post.* page 572. Case 256.

1792.

THE KING *against* SAMUEL MOUNCER AND OTHERS.

CASE CCLIV.

AT the Essex Lent Assizes 1792, *Samuel Mouncer*, *Robert Garrat*, and *Robert Smith* were tried before MR. BARON HOTHAM, on the statute 39 Eliz. c. 15. for that they, "On the 5th September, 1791, about the hour of three in the afternoon of the same day, with force and arms at the dwelling-house of *Daniel Hull*, there situate, feloniously did break and enter, (no person in the said dwelling-house then being) and one child's fustian coat, &c. of the value of ten shillings, of the goods and chattels of the said *Daniel Hull*, in the same dwelling-house, then and there being found, then and there feloniously did steal, take and carry away, against the peace of our said Lord the King, his crown and dignity."

The 3 & 4 Wil. & Mary, c. 9. takes away the benefit of clergy from persons aiding and assisting housebreakers, under the 39 Eliz. c. 15. S. C. 2 East, 639.

IT appeared in evidence that *Mouncer* only had broke and entered the house, and taken the goods, and that the other two prisoners waited at some distance in order to receive the goods, and assist him in carrying them away: but there was some doubt as to the property being of the value of *five shillings*.

THE prisoners' counsel contended that only *Mouncer* himself could be found guilty on this evidence; for that the statute 39 Eliz. c. 15. extended to principals in the first degree only; and not to persons present, aiding and abetting.

THE COURT. It was determined in the case of *Evans* and *Finch*, that the rule of law, which in cases of burglary makes persons waiting at a distance to assist the burglar, constructively present at the commission of the offence, does not apply to the crime for which these prisoners are indicted; for the statute 39 Eliz. c. 15. only excludes those from the benefit of clergy "who shall be *found guilty*; for the felonious taking away, in the day-time, of any money, goods or chattels, being of the value of five shillings or upwards, *in* any dwelling-house or houses, or any part thereof, or any out-house or out-houses belonging to and used with any dwelling-house or houses, although no person shall be in the said house or

4 Black. Com. 240.

1792.

MOUNCER'S CASE.

out-house at the time of such felony committed;" and therefore, in the case before-mentioned, where *Evans*, by a ladder, climbed to the upper window of a set of chambers in the Inner Temple, belonging to a *Mr. Audley*, and took away forty pounds; and his accomplice, *Finch*, only stood upon the ladder without going into the room, it was adjudged, on a special verdict, that *Finch* was intitled to the benefit of clergy, although the verdict found that he was within view of *Evans*, and saw *Evans* in the chamber, and was assisting and helping to the committing of the robbery, and received part of the money; for *Finch* was never *in* the house, and in so penal a law the words shall be strictly construed, and intended only to apply to the person actually breaking the house and taking the money there *in*, and not of a constructive breaking and larceny, as in cases of burglary (*a*). But by the statute 3 and 4 Will. & Mary, c. 9. s. 1. "All and every per-

Sed vide 2 Hawk. c. 33. sect. 98.

(*a*) *Hale* says, "the 39 Eliz. c. 15. binds up the exclusion of clergy to stealing *in* the house, 1 Hale, P. C. 528, 537. See also *Foster*, 108, 356, 418;" "that it only excludes the parties who actually take the property *in* the dwelling-house; not those that are present and assisting;" 1 Hale, P. C. 528; *Simpson* was indicted on this statute at the Lent Assizes for Cambridge, 16 Car. II. and it appeared, that he had taken plate out of a trunk in which it was contained, and laid it on the floor; but before he carried it away he was surprised and apprehended; and it was agreed by all the Judges, that this amounted to a stealing *in* the house within the meaning of the statute, for the felony is at common law; and by the common law, breaking the house and taking of goods and *removing them from one place to another in the same house* with an intent to steal them, is felony; for by thus taking them he hath the possession of them, and that is stealing and felony. Kely. Rep. 31. Foster, 109.—In Smith's Case also, Old Bailey October Session 1698, three persons were tried on this statute for breaking and entering the house of Miles Singleton in the day-time, no person being therein, and it appeared that a servant, in confederacy with the prisoners, let them into the house; in which they broke open several inner doors, and carried off goods to a great value, and it was objected that the servant being in the house, took the case out of the statute; but on reference to the JUDGES it was held to be well laid, for the house was equally defenceless with so treacherous a servant in it as if no person had been in fact therein. MS. And this case is referred to by Mr. East (2 Vol. 638.), to shew that such a breaking in the day-time as would constitute burglary if done in the night is sufficient.

son or persons that shall comfort, aid, abet, assist, counsel, hire, or command any person or persons to break any dwelling-house, shop or warehouse thereunto belonging, or therewith used, in the day-time, and feloniously take away any money, goods or chattels of the value of five shillings or upwards therein being, although no person shall be within such dwelling-house, shop, or warehouse, shall not have the benefit of clergy (*a*)."

1792.

MOUNCER'S CASE.

THE Jury found all the prisoners guilty to the value of four shillings and sixpence, and they were sentenced to be transported for seven years.

(*a*) *Quære* whether a person present at a robbery and assisting in it, but who does not enter the house, may be indicted as a principal, under either 39 Eliz. c. 15. or 3 & 4 Will. and Mary, c. 9. or whether he must be indicted as an aider and abettor under the latter Act. 2 East, P. C. 689.

THE KING *against* GEORGE HINDMARSH.

CASE CCLV.

AT the Admiralty Session held at the Old Bailey on the 7th June 1792, *George Hindmarsh* was tried before MR. JUSTICE ASHHURST, present MR. BARON HOTHAM, SIR JAMES MARRIOTT, &c. for murder.

On the trial of an indictment for murder, *the death* of the person charged to have been killed, may be collected from the circumstances, if incapable of being proved by other evidence.

THE indictment consisted of two counts.—THE FIRST COUNT stated, "that *George Hindmarsh*, late of *London*, mariner, not having the fear of God before his eyes, &c. on the 28th October, 1791, with force and arms, upon the high sea, within the jurisdiction of the Admiralty of England, TO WIT, about the distance of one league from *Annamaboe*, on the Coast of *Africa*, in and upon one *Samuel Burne Cowie*, then and there being, &c. &c. on board of a certain sloop called *the Eolus*, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said *George Hindmarsh* then and there, &c. with a certain large piece of wood of the value of one penny, which he the said *George Hindmarsh* then and there had and held, him the said *Samuel Burne Cowie*, in and upon the head, &c. feloniously, wilfully,

1792.

HINDMARSH'S CASE.

and of his malice aforethought, did strike and beat, giving him, &c. by such striking and beating, &c. divers mortal bruises and contusions in and upon the head, &c. of which said mortal bruises and contusions he the said *Samuel Burne Cowie* did instantly die; and so the Jurors, &c. do say, that the said *George Hindmarsh*, him the said *Samuel Burne Cowie* in manner and by the means aforesaid, then and there, &c. feloniously, wilfully, and of malice aforethought, did kill and murder, against the peace, &c."—THE SECOND COUNT charged, That the said *George Hindmarsh*, &c. in and upon the said *Samuel Burne Cowie*, feloniously, wilfully, and of his malice aforethought, did make another assault, and that the said *George Hindmarsh* then and there, &c. feloniously, wilfully, and of his malice aforethought, did cast and throw the said *Samuel Burne Cowie* from and out of the said sloop called *the Eolus*, into the high seas there, by means of which said casting and throwing of him the said *Samuel Burne Cowie* from and out of the said sloop into the high seas aforesaid, he the said *Samuel Burne Cowie* in and with the waters thereof, upon the high seas aforesaid, within, &c. was suffocated and drowned, of which said suffocation and drowning he the said *Samuel Burne Cowie* did then and there instantly die; and so the Jurors aforesaid, &c. say that the said *George Hindmarsh*, him the said *Samuel Burne Cowie*, in manner and by the means aforesaid, then and there, upon the high seas, &c. feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace, &c."

IT appeared in evidence that *Samuel Burne Cowie*, the deceased, was commander of *the Eolus*, a small vessel, employed in the Slave Trade, and on board which *Hindmarsh*, the prisoner, and *Andrew Spears*, *Giles Creed*, and *Henry Atkins*, the witnesses, were mariners; that the prisoner proposed to *Henry Atkins* to kill the captain; that the witness, *Spears*, was alarmed in his sleep during the dead of the night of the 28th October, 1791, by a violent noise; and on getting out of his hammock and going upon the deck, he observed the prisoner take the captain up and throw him overboard into the sea, and that he was not seen or heard of afterwards;

but that near the place, on the deck where the captain was seen, *Giles Creed*, the other witness, found a billet of wood; and that the deck, and part of the prisoner's dress were stained with blood.

GARROW, *for the prisoner*, contended, that on this evidence the prisoner was entitled to be acquitted; for it was not proved that the Captain was dead, and as there were many ships and vessels near the place where the transaction was alleged to have taken place, the probability was that he was taken up by some of them, and was then alive. He cited the passage in 2 Hale, P. C. 290, where his Lordship says, "I would never convict any person of murder or manslaughter, unless *the fact were proved to be done*, or at least *the body found dead*," and he mentioned a remarkable case which had happened before MR. JUSTICE GOULD. The case was this. The mother and reputed father of a bastard child were observed to take the child to the margin of the dock at *Liverpool*, and, after stripping it, cast it into the dock. The body of the infant was not afterwards seen; and as the tide of the sea flowed and reflowed into and out of the dock, the learned Judge who tried the father and mother for the murder of their child, observed, that it was possible that the tide might have carried out the living infant; and on this ground the Jury, by his direction, acquitted the prisoners.

THE COURT, which consisted of SIR JAMES MARRIOTT, *Judge* of the Admiralty, MR. JUSTICE ASHHURST, MR. BARON HOTHAM, and several Doctors of Civil Law, admitted the general rule of law.

MR. JUSTICE ASHHURST, who tried the prisoner, left it to the Jury upon the evidence to say, whether the deceased was not killed before his body was cast into the sea.

THE JURY found the prisoner *Guilty*, declaring that they were of opinion that the deceased was killed by a beating before he was cast into the sea.

THE COURT passed sentence of death, pursuant to the statute 25 Geo. II. c. 37. but ordered execution to be res-

1792. pited; and the case was mentioned to all the Judges at Serjeants'-Inn-Hall, on the first day of the ensuing Term, and they unanimously approved of the conviction.

HINDMARSH'S CASE.

THE prisoner was executed at Execution Dock.

CASE CCLVI.

THE KING *against* EDWARD OWEN.

Money feloniously obtained from a *person* by the practice of ring-dropping, although it is so obtained in the *dwelling-house* of another, is not a capital offence within the statute. 12 Ann. c. 7. S. C. 2 East, 645. See Rex *v.* Campbell, *ante*, p. 564. Case 253.

AT the Old Bailey in July Session 1792, *Edward Owen* was tried before MR. JUSTICE BULLER, present MR. JUSTICE WILSON, on an indictment which charged, "That he, together with one *John James*, on the 28th June, in the 32d year of George the Third, one hundred and five pieces of gold coin called guineas, of the value of 110*l.* 5*s.* of the proper monies of *John Pratt*, *John Watts*, and *Matthew Lowdoun*, in the dwelling-house of *Patrick Brady*, then and there feloniously did steal, take and carry away." There was a second count, laying it to be the property of *Thomas Holland*; and a third, laying it to be the property of *James Foreman*; both of them also charging the larceny to have been committed in the dwelling-house of *Patrick Brady*.

James Foreman, a servant to Messrs. *Pratt*, *Watts* and *Lowdoun*, manufacturers at *Southend* in *Essex*, came from thence to *London* on the 28th June 1792, and went to the counting-house of Mr. *Watts*, at *Walworth-stairs*, where he received one hundred and five guineas on his master's account, for the purpose of taking them to *Southend* to pay the workmen's wages. Walking up *Holborn* in his way to *Gray's Inn-lane*, where he was ordered to call on some other business, he met with the prisoner *Owen* near *Middle-Row*, and entered into a conversation with him, respecting the curiosities of *London*. The prisoner soon afterwards stooped down, and picked up A PURSE; and in order to examine and divide its contents, he and *Foreman* went together to the house of *Patrick Brady*, who kept *the Castle Inn*, on the north side of *Holborn*. Almost immediately on their entering the house, they were joined by *John James*, to whom *Owen* communi-

1792.

OWEN'S CASE.

cated the good fortune they had met with, and produced the purse. *James* opened it, and turned out a bill of parcels, and a receipt for a diamond cross, value 230 guineas, and a small, elegant fish-skin box, containing the supposed jewel. *James*, after admiring the brilliancy of the diamonds, and seeming to envy the good fortune of the finders, addressed himself to *Foreman*, saying, that as he was present when it was found, he was legally intitled to half its value, and offered him one hundred guineas for his share, which he said he would immediately fetch. Having been a short time absent, he returned, and lamenting extremely that he had not been able to get the money, asked *Foreman* if he thought that he could raise it, promising that if he could, he would return him the 100 guineas, and another hundred to it. *Foreman*, tempted by the hope of getting 100 guineas, immediately drew his master's money from his pocket, and deposited 100 guineas on the table. *James* immediately took up the money, and, telling *Foreman* that his name was *Brownsell*, a wholesale dealer on *Holborn-hill*, and that if he would meet him there between six and seven o'clock in the evening, he should have the whole money, to which *Foreman* agreed, went away: *Foreman* went to the house of the tradesman to which *James* had given him direction, and there discovered the deception. *Foreman*, alarmed at the idea of losing his money, went to several places which *James* had mentioned during their conversation, in hope of finding him, but without effect; but on returning to *the Castle Inn*, he fortunately met with *Owen*, who carried him to a house in *Old-street*, where he again met with *James*. At this house some of the officers of the Public-office in *Bow-street* happened accidentally to be on the watch for some other offenders; and, on *Foreman* exclaiming that he had been robbed, *Owen* was seized, but *James* made his escape. On searching him, 98 guineas were found. *Foreman* admitted that the money was the property of his master, and that he had assented to *James*'s taking it away, in expectation of receiving it back, and 100 guineas to it, at the time and place appointed. The supposed diamond cross, which had been left in *Foreman*'s hands as a security for the

1792. money he had advanced, was proved to be worth no more than half-a-guinea.

OWEN'S CASE.

It was objected that this was not a case within 12 Ann. c. 7. because *Foreman* was neither the owner of, nor a settled inhabitant in the house in which the money was taken; and that it must be taken as if the property has been stolen out of his pocket, or otherwise taken from his person, without any deceit; for that the statute was only intended to protect money, goods or chattels, wares or merchandises of the value of forty shillings or more, usually kept or deposited in *the house* as contradistinguished from property under the protection of *the person*; and the case of *Rex* v. *Campbell* was cited as an authority in point.

The Jury found the prisoner *Guilty*; but the judgment was respited, and the case reserved for the opinion of the twelve Judges, on a question, Whether, as this was a taking from *the person* of *Foreman*, though in the dwelling-house of *Brady*, the prisoner was ousted of his clergy under the statute of the 12 Ann. c. 7.

Mr. Justice Ashhurst, in February Session 1793, said that the Judges were of opinion, that the prisoner was not, under the circumstances of this case, deprived of his clergy by the 12 Ann. c. 7.; and that this opinion was founded on the authority of the case of *Rex* v. *Campbell*, in January Session 1792, for that to bring a case within this statute, the property stolen must be under the protection of the house; and deposited therein for safe custody; as the furniture, plate, money kept in the house, and not things immediately under the eye or personal care of some one who happens to be in the house (*a*).

(*a*) See S. P. Campbell's Case, *ante*, p. 564, Case 253; and the same point was again ruled in a similar case of Rex *v.* Castledine, before Mr. Justice Buller, at the Old Bailey, in October Session 1792, which was also referred to the Judges; and again in Watson's Case, Old Bailey, December 1794, *post*.

1792.

THE KING *against* ISAAC MOORE.

CASE CCLVII.

AT the Old Bailey in September Session 1792, *Isaac Moore* was tried before MR. BARON HOTHAM, present MR. JUSTICE GOULD, upon an indictment which stated that he, "*Isaac Moore*, on the 23d June in the 32d year of GEORGE THE THIRD, was a Letter-carrier employed in carrying letters and packets from the General Post-office, &c. to a certain street called *Charlton-street* in *Mary-le-bone*, AND THAT on the 23d June aforesaid, at and in the said General Post-office, *two certain letters* then *lately before* sent by *William Collier* by the post from *Silsoe* in the county of *Bedford*, and directed 'To *Charles Quin* of *Charlton street* in the parish of *Mary-le-bone* in the county of *Middlesex*,' then containing therein a certain Bank-note, marked No. 1967, dated London, 9th February 1792, signed and subscribed by *Giles Collins* for the Governor and Co. of the Bank of England, promising to pay to one *Abraham Newland* or bearer, on demand the sum of £10. THE TENOR of which, &c. Which said *two letters* had come to the hands and possession of the said *Isaac Moore*, then and there being a Letter-carrier so employed as aforesaid, to be by him the said *Isaac Moore*, as such Letter-carrier, delivered, &c. and that he being, &c. and having the said *two letters* containing the said Bank-note in his hands and possession, feloniously did *secrete* the said letters then and there containing the said Bank-note, &c." A second count laid it to be the property of *Charles Quin*. A third and fourth count called them "two certain packets," laying them respectively to be the property, 1st, of *William Collier*; 2dly, of *Charles Quin*. There were four other counts, alleging, in the singular number, "a certain letter," a certain packet, the property of *William Collier* and *Charles Quin* respectively."

If a Letter-carrier secrete two letters sent by the post on different days, each letter containing half of the same Bank-note, it is a capital offence within the statute 7 Geo. III. c. 50. and he may be indicted "that he having the said *two letters* containing the said *Bank-note*, did secrete the said letters, &c." S. C. 2 East, 582.

THE prosecutor *William Collier* resided at *Pullock's Hill* in *Bedfordshire*; the nearest post-town to which is *Silsoe*. On the 21st June 1792 he inclosed, among others, *one half*

1792.

MOORE'S CASE.

of the Bank-note stated in the indictment, in a letter directed "To *Charles Quin*, No. 19, *Charlton-street, Mary-le-bone*," and put the letter into the *Silsoe* bag. On the succeeding day, *viz.* the 22d June 1792, he sent the *other half* of the said Bank-note, in a letter directed to the same person, by the same conveyance. It was proved by the Post-master of *Silsoe*, that the *Silsoe* bag was regularly made up on the 21st and 22d of June, and conveyed, in the usual course, from thence to *Luton*, and so on through *St. Alban's* to the General Post-office in *London*, where they respectively arrived on the 22d and 23d *June*; and that on those days the letters directed for *Charlton-street, Mary-le-bone*, were delivered to the prisoner as the Letter-carrier of that district; but no such letters ever reached Mr. *Quin's* hands. The Bank-note, in two halves joined, was found in the possession of the prisoner on the 23d June, at half past nine o'clock in the evening.

THE statute 7 Geo. III. c. 50. s. 1. after reciting that it is of the utmost importance to the trade and commerce of these kingdoms, that all letters, packets, bank-notes, bills of exchange, *and other things*, may be sent and conveyed by the post with the greatest safety and security, ENACTS, "That if any deputy, clerk, agent, letter-carrier, post-boy, or rider, or any other officer or person whatsoever, employed in receiving, stamping, sorting, charging, carrying, conveying or delivering letters or packets, or in any other business relating to THE POST-OFFICE, shall secrete, embezzle or destroy any letter or letters, packet or packets, bag or mail of letters, which he, she or they shall be respectively intrusted with, or which shall have come to his, her or their hands or possession, containing any *Bank-note*, Bank-post-bill, bill of exchange, &c. every such offender shall suffer death without benefit of clergy."

KNOWLYS, *for the prisoner*, submitted to the Court, that the present case was not within the words of the statute, inasmuch as it was confined throughout to the *secreting* or embezzling of any letter or letters containing any Bank-note,

and that here there was no letter that did contain a Bank-note. 1792.

MOORE'S CASE

MR. BARON HOTHAM and MR. JUSTICE GOULD were of opinion that this was a case that required the consideration of the Judges.

LORD LOUGHBOROUGH, in the December Session following, delivered their opinion. On the trial of this indictment a doubt arose, Whether, on the facts disclosed, the prisoner has committed an offence within the terms and meaning of the statute 7 Geo. III. c. 50. It appeared in evidence, that the Bank-note had been cut into two parts; that one part of it was inclosed in a letter sent one day; that the other part of it was inclosed in another letter, and sent the next post-day; and that the two letters, each containing a part of this Bank-note, were secreted by the prisoner. It was contended for the prisoner, that as these two several parts of the Bank-note were contained in different letters, and the letters secreted at two several and distinct periods of time, each secreting must be taken to be a separate and distinct act, neither of them amounting to the offence described in the statute, inasmuch as the prisoner had not at any one time secreted any letter or letters containing *a Bank-note.* BUT ALL THE JUDGES who were present, are of opinion that the offence, as stated in the indictment and proved by the evidence, falls, both in form and substance, directly within the meaning of the first section of the statute, which has put persons thus entrusted with letters under a specific and peculiar law. The charge is not the *stealing of the letter*, but the *secreting of the note* contained in the letters during their transitory state by the public conveyance of the kingdom. The statute seems to have been worded with great caution and wisdom; for it includes persons of every description, of every office, and in every capacity that may by any possibility be employed in or about the business of the post-offices: "if any deputy, clerk, agent, letter-carrier, post-boy, or rider, or any other officer or person whatsoever, employed in receiving, stamping, sorting, charging, carrying, conveying or delivering letters or packets, or in any other business relating

Buller J. was absent, and doubted.

1792.

MOORE'S CASE.

to the post-office, shall *secrete* (*a*), embezzle or destroy any letter or letters, packet or packets, bag, or mail of letters containing any Bank-note, Bank post bill, bill of exchange, or shall steal and take out of any letter or packet that shall have come into his possession, &c. any such Bank-note, Bank-bill, &c. he shall be guilty of felony, &c." Now it is clear that the prisoner secreted the *letters* in which this note was contained; and that these letters came into his custody as a letter-carrier; for he secreted two certain letters, before sent by the post, in which two letters a Bank-note was then contained, and by that means he secreted *letters* containing a *Bank-note*, which is the offence charged in the indictment, and expressed by the words of the statute, and to which charge the evidence alone applies. The Judges, therefore, are of opinion that the prisoner is rightly convicted (*b*);

AND, at the close of the Session, the prisoner received sentence of Death.

(*a*) The doubt was whether *secreting* in the statute did not mean the original secreting, as taking does. But they distinguished between taking and secreting; for after the prisoner got possession of the second letter, he secreted both.

(*b*) And now by 42 Geo. III. c. 81. it is made a capital offence in any of the persons mentioned in 7 Geo. III. c. 50. s. 1. to secrete, embezzle or destroy, any letter or letters, &c. containing any *part or parts* of any such security or instrument as mentioned in 7 Geo. III. or to steal or take out of any such letter any such security or instrument. And by 52 Geo. III. c. 143. ss. 2. 3 & 4. (which enacts that in all cases where any act is done in breach of any revenue law making the offence a *capital felony*, such act shall be deemed *within benefit of clergy* unless otherwise declared by this Act), this offence is extended to aiders and abettors therein, and both principals and accessaries made liable to capital punishment.

CASE CCLVIII.

THE KING *against* J. BAXTER.

An indictment for *a misdemeanour* on the 22 Geo. III. c. 58. against a convicted. S. C. 5 Term Rep. 83. S. C. 2 East, 781.

IN the King's Bench in Michaelmas Term 1792, the defendant was indicted and convicted on the statute 22 Geo. III. receiver of stolen goods, need not aver that the principal has not been

1792.

BAXTER'S CASE.

c. 58. The statute, after reciting "That the practice of buying and receiving stolen goods had become a great evil, by reason of the difficulty of discovering the persons guilty of the same, and of the insufficiency of the laws for the punishment of such offenders in certain cases," ENACTS, "That in all cases whatsoever, where any goods or chattels (except lead, iron, copper, brass, bell-metal and solder) shall have been feloniously taken or stolen, whether the offence of the person so taking or stealing the same shall amount to grand larceny or some greater offence, or to petit larceny only (except where the person actually committing the felony shall have been already convicted of grand larceny or of some greater offence) every person who shall buy or receive any such goods and chattels, knowing the same to have been so taken or stolen, shall be held and deemed guilty of, and may be prosecuted for, A MISDEMEANOUR, and shall be punished by fine, imprisonment, or whipping, as the Court shall think fit to inflict, although the principal felon be not before convicted of the said felony, and whether he is amenable to justice or not; and in cases where the felony actually committed shall amount to grand larceny, or to some greater offence, and where the person or persons actually committing such felony shall not be before convicted, such offender or offenders shall be exempted from being punished as accessary or accessaries, if such principal felon or felons shall be afterward convicted."

THE indictment consisted of two counts. The first count stated, that goods of the value of *five shillings* were feloniously stolen *by some person or persons unknown*, and that the defendant afterwards unlawfully received them, knowing them to have been stolen. The second count alleged the goods to be of the value of *six-pence*.

A motion was made to arrest the judgment, on the ground that the indictment was defective, inasmuch as it had not stated negatively that the person or persons who had stolen the goods had not been convicted; and it was argued by MR. SERJEANT LAWRENCE and MR. LAW in the preceding Easter Term; but the Court took time to consider of it: and now the opinion of the Court was delivered by

1792.

BAXTER'S CASE.

MR. JUSTICE BULLER. After the argument we wished to consult the rest of the Judges upon this subject, not so much on any doubt we entertained ourselves, as because it was a point likely to arise on the circuits; and accordingly we have consulted ALL THE JUDGES OF ENGLAND, who are unanimously of opinion that there is no foundation for the objection as applied to either of the counts. As to the second count, the exception in the statute, as to persons convicted, only mentions the instance of persons convicted of *grand larceny or of some greater offence*, which does not apply to the case of *petty larceny*. The first count has also been considered, and on two grounds we think it may be supported. First, on account of the particular manner in which this indictment is drawn, which alleges that the goods were stolen *by some person or persons unknown*: this we think is equivalent to saying that those persons had not been convicted. But the other ground on which we are of opinion that this count is good, is, that it is not necessary in such an indictment against the receiver to aver that the principal has not been before convicted. If it were, it would be merely stating a *negative averment*, which need not be proved by the prosecutor. Such a fact is *matter of evidence* to be proved by the defendant, and which, when proved by him, would entitle him to an acquittal. This opinion is warranted by the case of *Rex* v. *Pollard* (1): that was an indictment on the statute 5 Ann. c. 31. s. 5 & 6. and the objection was, that the prosecutor had not averred that the principal could not be taken; but the Court held that that averment was not necessary; and the principle of it is to be found in an older authority, 1 *Sid.* 303. and also in 2 *Hawk. P. C.* bk. 2. c. 25. s. 112. where it is stated, that if there be any description in *the negative*, the affirmative of which would be an excuse for the defendant, the proof of it lies on him (*a*), and it need not be stated in the indictment.

(1) 2 Ld. Ray. 1370. But see Foster's C. L. 374.

AND judgment was passed on the defendant accordingly.

(*a*) See Jonathan Wild's Case. 2 East's C. L. 746. and the Case of Williams *v.* The East India Company. 3 East's Term Rep. page 192.

1792.

THE KING *against* JOHN DUNNETT.

CASE CCLIX.

An indictment charging the prisoner with having forged a *bond obligatory* is good; though the instrument charged to have been forged have no condition with a penalty or defeazance annexed to it.

S. C. 2 East, C.L. 985, 986.

AT the Old Bailey in December Session 1792, *John Dunnett* was tried on the statute 2 Geo. II. c. 25. s. 1. on an indictment which charged "That he, on 8 November 1792, feloniously did utter and publish as true a certain false, forged and counterfeit *bond and writing obligatory* purporting to be signed by *Peter Richardson*, *William Goodluck*, *George Arnull*, and *William Lea*, and to be sealed and delivered by the said *Peter Richardson*, *William Goodluck*, *George Arnull*, and *William Lea* to *John Dunnett*, THE TENOR of which said false and counterfeited *bond obligatory* is as follows:—" KNOW ALL MEN by these presents, that we *Peter Richardson*, *William Goodluck*, *George Arnull*, and *William Lea* of the city of London, are held and firmly bound to *John Dunnett* in the sum of Two Thousand Five Hundred and Ten Pounds of lawful money of Great Britain, to be paid to the said *John Dunnett*, his successors, heirs or administrators, or either of them, the said sum of Two Thousand Five Hundred and Ten Pounds of like money to be paid by us, our successors, heirs, executors or administrators; therefore, we are firmly bound to the said *John Dunnett* in Two Thousand Five Hundred and Ten Pounds of lawful money of Great Britain, to be paid by us, our successors, heirs, executors or administrators; therefore we firmly bind the same. Dated this Twentieth day of November, and in the Thirtieth year of our Sovereign, by the grace of God, of Great Britain, France and Ireland King, Defender of the Faith, and so forth, and in the year of our Lord 1720. Being sealed with our seal of office the year and day above written.

Signed (being first duly stamped) in the presence of
T. ROBERTS.

P. RICHARDSON.
WM. GOODLUCK.
GEORGE ARNULL.
WM. LEA."

THE receipts for the interest being as follows:—" Received 4 January 1792 in trust £50. JOHN DUNNETT." " Received

1792. 20 January 1792 in trust £50. JOHN DUNNETT."—with intent to defraud the said *Peter Richardson, William Goodluck, George Arnull*, and *William Lea*, he the said *John Dunnett* at the same time well knowing the said *bond obligatory* to be false, forged and counterfeit, against the form of the statute in such case made and provided, &c." *viz.* the 2 Geo. II. c. 25.

DUNNETT'S CASE.

THE Prisoner was the son of a Gentleman, who resided at *Rainsthorp-Hall* in the vicinity of *Norwich*, and had for some time previous to this transaction, and since the death of his father, cultivated his lands, for the purpose of raising and selling particular kinds of seeds for the London Market. About four or five years anterior to the trial he had informed a *Mr. Sewell*, a confidential friend to the family, that he was possessed of personal property in Bills of Exchange on different persons, and *a Bond* which he had received as a security for his share of a Prize in the Lottery, amounting all together to Three Thousand Pounds. In the month of March, 1791, in consequence of having indiscreetly purchased an estate for the sum of £6000, the deposit on which he was advised by his friends to forfeit, it was discovered that his affairs were in a very embarrassed situation; and on the 8th October he applied to *Mr. Sewell*, who was an attorney at *Norwich*, to receive the money due on this Bond; but his creditors becoming extremely importunate, he called them together, and assigned all his property to *Mr. Sewell*, in trust for the payment of their demands. The property thus assigned consisted of the Bond stated in the indictment, and other personal securities to the amount of £500: the debts he owed amounted to rather more than £700. Early in the month of November, 1791, the prisoner *Dunnett* and *Mr. Sewell*, accompanied by *Mr. Railton*, an attorney of *London*, as Agent of *Sewell*, waited on *Richardson, Goodluck and Co.* Lottery-Office Keepers, to demand payment of the Bond, but they denied ever having executed such an instrument, and made it appear most clearly that their names had been forged. It appeared that *Richardson and Goodluck* had a Clerk whose name was *Arundel Roberts* who had transacted lottery business

with the prisoner for his masters, but it was proved that the attestation of the bond was not his subscription. 1792.

DUNNETT'S CASE.

THE Jury found the prisoner *Guilty*.

THE statute 2 Geo. II. c. 25. on which the indictment was founded, enacts, "That if any person shall falsely make, forge or counterfeit, &c. or shall utter, &c. any deed, will, testament, *bond*, *writing obligatory*, bill of exchange, promissory note for payment of money, knowing the same to be false, forged or counterfeited, he shall be guilty of felony without benefit of clergy."

IT was contended in arrest of judgment on behalf of the prisoner, that as the instrument set forth in the indictment had no condition with a penalty annexed to it, it could not be considered as a *Bond obligatory*; for that such a condition was essentially necessary to a Bond; that it must therefore be considered merely as a *Writing obligatory*; and as the statute had distinctly mentioned both these sorts of instruments, and had considered them, as they in fact are, distinct and different instruments, the indictment should have charged it to be a *Writing Obligatory* only, and not have confounded the two species in the individual appellation of "*a Bond and writing obligatory*," and on this objection the case was saved for the opinion of THE TWELVE JUDGES.

THE JUDGES, in Easter Term 1793, held that the instrument was well described; but as the prisoner died in Newgate a short time previous to the April Session 1793, no opinion was publicly given.

1793.

CASE CCLX.

THE KING *against* REMNANT.

THE statute 7 Geo. II. c. 21. enacts, "That if any person or persons shall, with any offensive weapon or instrument, unlawfully and maliciously assault, or shall by menaces, or in

A *commitment* on the 7 Geo. II. c. 21. charging that the defendant with "*force and arms made an assault on A., with intent feloniously to steal, take and carry away from the person of the said A., &c.*" is bad, and the defendant intitled to be bailed. S. C. 1 East, 420. S. C. 5 Term Rep. 169. See Jackson and Randal's Case, O. B. April 1783, *ante*, p. 267, Case 73. Thomas's Case, July, 1784, *ante*.

1793.

REMNANT'S CASE.

or by any forcible or violent manner, demand any money, goods or chattels, of or from any other person or persons, with a felonious intent to rob or commit robbery upon such person or persons, all and every such person or persons so offending shall be adjudged guilty of felony."

THE defendant had been committed for that "with force and arms he made an assault on the prosecutor with intent feloniously to steal, take and carry away from the person of the said, &c."

IT was moved in B. R. Hilary Term 1793, that he might be admitted to bail, as the commitment did not specify any offence within the above statute; for he is neither charged with having *made an assault with an offensive weapon*, or with having *by menaces*, or *in a violent manner demanded* money, goods or chattels of the prosecutor; and also because the latter part of the commitment did not charge the defendant with a felonious intent *to rob*, but merely with a felonious intent to *steal, take, and carry away, &c.* and the case of *The King* v. *Judd* (1) was cited.

(1) Ante, page 484. Case 223.

THE COURT at first were inclined not to bail the defendant, saying that *a commitment* need not be drawn with the same precision as *an indictment*. But on the next day they ordered the defendant to be bailed.

CASE CCLXI.

THE KING *against* JOHN MATHEWS.

An indictment for an assault, describing the defendant as "late of *A.*, in the county of *B.*," without stating that *A.* was *a parish*, is bad, although the offence is laid to have been committed "at the parish aforesaid." S. P. Vale *v.* Frelon, 1 Roll. Rep. 21. S. P. Spencer *v.* Savage, 1 Roll. Rep. 27.

THIS was a motion in B. R. Hilary Term 1793, to arrest the judgment on an indictment for an assault. The indictment stated "That *John Mathews*, late of *Woolhampton*, in the county of *Berks*, with force and arms, at *the parish aforesaid*, in the county aforesaid, made an assault on *Thomas Williams*, &c." and concluded "against the form of the statute in such case made and provided."

THE first objection was, that as it only stated the defend-

1793.

MATHEWS'S CASE.

ant to be "late of *Woolhampton*," not describing it as *a parish*, and referred, in stating the assault, to "*the parish aforesaid*," when no parish had before been expressly mentioned, it did not appear in what *place* the offence had been committed, and that therefore the indictment was without a proper *venue*; and the cases of *Rex* v. *Shaw* (1) and *Sir H. Rolle* (2) were cited.

(1) Latch. 194.

(2) 1 Roll. Rep. 223.

ON the other side it was argued, that as no other place than *Woolhampton* was mentioned, and the offence was alleged to have been committed "at *the parish* aforesaid," *Woolhampton* must, by necessary inference, be taken to be a parish.

BUT THE COURT was of opinion, that the objection was fatal; for that nothing could be intended concerning *Woolhampton*, because there was no occasion at the trial to prove what place it was; that some certain *venue* ought to appear on the face of the record; but that the offence was laid "at the parish aforesaid," and no parish is before mentioned.

AND on this objection the judgment was arrested.

A SECOND OBJECTION was taken, that the indictment was bad, because it concluded "*against the form of the statute*," whereas an assault is an offence at common law only.

On an indictment for an assault "*against the form of the statute*;" these words are *surplusage*.

BUT THE COURT said there was clearly no foundation for this objection, for that it had been frequently over-ruled, and determined that the words "*against the form of the statute*" might be rejected as surplusage.

S. P. Rex *v.* Bathurst, Say. Rep. 225. 4 Hawk. P. C. ch. 25. s. 115. Bennett *v.* Talbot, 5 Mod. 307. Rex *v.* Smith, Dougl. 445.

THE KING *against* DE VEAUX AND OTHERS.

CASE CCLXII.

AT the Session at *Hicks's Hall* 1792, *De Veaux* and others were convicted of obtaining certain drapery goods by false pretences from *John Patrick*, a linen-draper in *Mary-le-bone-street*, near *Golden-square*. The goods, after they had been thus fraudulently obtained by *De Veaux* and the other defendants, took them away, extends only to a *felonious*, and not to a *fraudulent* taking.

The statute 21 Hen. VIII. c. 11. which restores goods to a prosecutor on conviction of the person who

S. C. 2 East, 789, 839.

1792.

DE VEAUX'S CASE.

were immediately pawned by them, at different times, at the shop of *William Parker*, a pawnbroker in *Princes-street*, but it did not appear, from the manner in which they were pawned, that *Parker* had any reason to suspect that they had been dishonestly obtained; and both himself and his shopman attended the trial at *Hicks's Hall*, gave evidence on the part of the Crown, and produced the goods which had been thus obtained from *Patrick* and pawned with him by the said *De Veaux*. On the Jury finding the defendants guilty, *Patrick* took possession of the goods produced by *Parker*, and carried them home: But *Parker* having been advised that he had no right so to do, insisted on having them returned; and *Patrick* refusing to restore them, *Parker* brought an action of *trover* against him for them in the Court of King's Bench; and, on a trial before LORD KENYON, at the Sittings after Hilary Term 1793, obtained a verdict.

THE Counsel for *Patrick*, in Easter Term 1793, moved the Court that a non-suit might be entered on the ground that the law in this case was precisely the same as if the goods had been taken from *Patrick* feloniously; and that *De Veaux* having obtained them fraudulently from him, he could not give a legal title to them to *Parker*, although *Parker* was totally ignorant of the fraud.

2 Bulst. 310. Co. Eliz. 661. Kely. 48. 5 Co. 110.

BUT THE COURT said, that this case was distinguishable from the case where the goods had been obtained by *felony*; for that the statute 21 Hen. VIII. c. 11. enacted, "That if any felon do rob or take away any money, goods or chattels from any subject, from their person or otherwise, and be found guilty thereof, or otherwise attainted by reason of evidence given by the party so robbed or owner of the said money, goods or chattels, or by any other by their procurement, that then the party so robbed, or owner, shall be restored to his said money, goods and chattels," and that this statute relates to goods *feloniously* obtained, not to goods obtained by *fraud* only. And the rule prayed to enter a non-suit was accordingly refused (*a*).

(*a*) On the 29th June 1787, eighteen sheep were stolen from Mr. *Horwood*, a farmer in *Northamptonshire*, and on the 6th July following, Mr. *Smith*, a farmer in *Middlesex*, bought the same sheep of a regular sales-

1792.

DE VEAUX'S CASE.

man at a fair price in *Smithfield market*. On the 17th day of the same month, which was the commission-day of the Summer Assizes at *Northampton*, one *Bateman* was apprehended as the person who had stolen the sheep, and Mr. *Horwood*, who was bound over to prosecute him at the next Assizes, gave notice on the same day to Mr. *Smith* that the sheep had been stolen from him, and desired they might be restored to him, but which Mr. *Smith* refused to do: *Bateman* was discharged from gaol by proclamation for want of prosecution. In the month of *November* following Mr. *Smith* sold the sheep at the then market price. In the month of *February* 1788, *Bateman* was again apprehended for the same offence; indicted at the ensuing Lent Assizes for the county of *Northampton*, and on the prosecution and evidence of Mr. *Horwood*, convicted of the sheep-stealing and afterwards hanged. Mr. *Horwood* afterwards gave notice to Mr. *Smith* of *Bateman*'s having been convicted and executed for stealing the eighteen sheep which he had bought on the 6th July 1787, in *Smithfield market*, and again demanded that they might be restored, but which Mr. *Smith* again refused to do, or to pay the value of them, and Mr. *Horwood* brought an action of TROVER to recover the same, when a verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench, whether he was, under the above circumstances, intitled to recover: And THE COURT were of opinion, that he was not; for that to maintain this action, the defendant should have been in possession of the sheep when the attainder happened. The statute 21 Hen. VIII. c. 11. had directed that in certain circumstances there shall be a restitution of the goods. But during the interval between the felony and the conviction, the property remains *in dubio*, liable to be defeated by the attainder; now during that time the defendant purchased the goods in question for a valuable consideration. If in this case the goods had remained in the defendant's possession at the time of the attainder, that would have altered the case; but he had the good fortune to get rid of them before that time, and another person was then substituted in his room. The plaintiff has a right to the restitution of the goods in specie, and perhaps would be intitled to recover damages in TROVER against any person who is fixed with the goods after conviction and refuses to restore or deliver them; for then the goods are converted to the prejudice of the owner. The notice that was given in this case does not alter the law; for the plaintiff could not demand the sheep from the defendant, merely because they had been stolen from him; for it was not then certain that the felony would be followed by a conviction of the offender. The plaintiff's property in the sheep did not begin till after the conviction of the felon, and before that time the property had been altered by sale in *market overt*: And if this action could be maintained, it would defeat the object of the Act of Parliament; for if persons in whose possession goods which had been stolen came fairly, and for a valuable consideration, were compellable to deliver them up before a conviction of the felon, it would take away the incitement to the prosecutor to convict the felon.

1793.

CASE CCLXIII. THE KING *against* JOHN SMITH BURNEL.

An indictment on the statute 3 & 4 Will. and Mary, c. 9. s. 5. for robbing lodgings, stating that the goods stolen were "in a certain "lodging-"room in the "dwelling-"house of the "said *A. B.* "there situ-"ate, let by "contract by "the said "*A. B.* to the "said *C. D.* "and to be "used by the "said *C. D.* "with the "lodgings "aforesaid," without stating that *the goods* were *then* let to *C. D.* viz. "there situate, "*then* let by "contract by "the said "*A. B.* to the "said *C. D.* "&c." is good.

S. C. 2 East, 587.

AT the Old Bailey in June Session 1793, *John Smith Burnel* was tried before MR. JUSTICE BULLER, present MR. JUSTICE WILSON, upon the statute 3 & 4 Will. and Mary, c. 9. s. 5. which enacts, "That if any person or persons shall take away, with an intent to steal, embezzle, or purloin, any chattel, bedding, or furniture, which by contract or agreement he or they are to use, or shall be let to him or them to use, in or with such lodging, such taking, embezzling or purloining, shall be to all intents and purposes taken, reputed, and adjudged to be larceny and felony."

THE INDICTMENT stated, "That *John Smith Burnel*, late of the parish of *St. James*, in the Liberty of *Westminster*, in the County of *Middlesex*, labourer, on the 24th day of March, in the thirty-third year of the reign of GEORGE THE THIRD, with force and arms at the parish aforesaid, in the county aforesaid, two feather beds of the value of four pounds of the goods and chattels of *Thomas Neale* (the same goods and chattels being in a certain lodging-room in the dwelling-house of the said *Thomas Neale* there situate, let by contract by the said *Thomas Neale* to the said *John Smith Burnel*, and to be used by the said *John Smith Burnel* with the lodging aforesaid), then and there being found, feloniously did steal, take, and carry away, against the form of the statute in that case made and provided, and against the peace of our said Lord the King, his crown and dignity."

THE Jury found the prisoner *Guilty*.

GARDINER, *for the prisoner*, moved in arrest of judgment, that it did not appear upon the face of the indictment that the contract was in existence at the time the theft was committed. The indictment only states that the goods stolen were in a lodging-room in the dwelling-house of *Neale*, THERE situate, let by contract by *Neale* to *Burnel*, and to be used by *Burnel* with the lodging; but it does not state that the goods were THEN let to the prisoner: the word "then"

ought to have been inserted between the words "situate" and "let," for as the indictment now stands, it does not appear that the contract was not at an end at the time the theft was committed; and if the contract was at an end, the prisoner ought to have been charged with simple grand larceny at the common law, and not upon the statute. There is no averment in any part of the record by which the want of the word "then" can be supplied, or from which the existence of the contract at the time can be legally intended: The words "then and there being found," which are inserted after the words "lodging aforesaid," cannot be applied to remedy this defect, for they only relate to the time and place when and where the theft was committed, and do not, in any possible mode of construction, connect the time of its being committed with the duration of the contract, which might have been at an end, or might not have commenced at the time when the goods were taken away: and in either of these cases no judgment ought to be given on this indictment. *Staundford*, *Hale*, *Hawkins*, and all the writers upon Crown Law, lay it down as a settled and established principle, that in an indictment nothing material can be supplied by implication and intendment, and this omission is not mere matter of form, but is an omission in substance; for unless the contract existed at the time the goods were purloined, the prisoner has not offended against this statute, and whatever forms an essential part of the description of an offence must be averred in the indictment.—Every allegation in this indictment may be true, and yet the prisoner be innocent of the charge intended to be contained in it.

THE COURT reserved the case for the opinion of THE TWELVE JUDGES.

MR. JUSTICE ASHHURST, in the December Session following, delivered the opinion of the Judges to the following effect:—The substance of the objection is, that the words "let by contract," as they stand in this indictment, refer only to the dwelling-house in which the prosecutor lived, and not to the lodging-room therein which he let to the prisoner. It might be a sufficient answer to this objection, that the form

1793.

BURNEL'S CASE.

in which this indictment is drawn is that it has been invariably used ever since the statute of 3 & 4 Will. and Mary was made. When law proceedings were in the Latin tongue, the place *loca* in the plural number might stand both for the house and the lodging. But there is a much easier answer to be given to it, which is, that every common reader would naturally understand the words "let by contract" to apply to the lodging-room, and not to the dwelling-house. Pleadings, when put upon record, are without any punctuation, and Courts in reading them are bound to introduce such stops as are most apposite and sensible. In the present indictment, if the words "in the dwelling-house of the said *Thomas Neale*" be put in a parenthesis, no chasm at all will remain between what goes before and follows after, and then it would read thus, "the same goods and chattels being in a certain lodging-room (in the dwelling-house of the said *Thomas Neale*) there situate, let by contract by the said *Thomas Neale* to the said *John Smith Burnel*, and to be used by the said *John Smith Burnel* with the lodging aforesaid." By this means the clear and natural import of the words are ascertained. The Judges therefore are of opinion that there is no weight in the objection, and that this conviction is legal.

In January Session 1794, the prisoner was put to the bar, fined one shilling, and discharged.

CASE CCLXIV. THE KING *against* JEREMIAH READING.

An indictment for forging a bill of exchange, stating that it purported to be directed to *John King*, by the name and description of *John Ring*, Esq. is bad; for the purport of an instrument is that which appears on the face of it. S. C. 2 East, 952, 981. See Rex *v.* Gilchrist, *post*, Feb. Session 1795.

AT the Old Bailey in September Session 1793, *Jeremiah Reading* was tried before MR. JUSTICE GROSE on an indictment which stated that *Jeremiah Reading*, late of *London*, labourer, having in his custody and possession a certain bill of exchange with the name of *John White* thereunto subscribed, purporting to be signed by one *John White*, and to

1793.

READING'S CASE.

be directed to one *John King*, by the name and description of *John Ring*, Esq. *Berkeley-street*, *Portman-square*, *London*, for the payment of the sum of eighty pounds to him the said *Jeremiah Reading*, or order, forty days after the date of the said bill of exchange, which said bill of exchange is to THE TENOR and effect following, that is to say,

" £80. BRISTOL, February 21, 1792.

" FORTY DAYS after date pay to Mr. *Jeremiah Reading*, or order, the sum of eighty pounds for value received, and place it to the account of " JOHN WHITE."

" To John Ring, Esq.
Berkeley-street, Portman-square, London."

He, the said *Jeremiah Reading*, on the twenty-ninth day of February, in the thirty-second year, &c. with force and arms at *London*, that is to say, at the parish of *St. Peter*, *Cornhill*, in the Ward of *Lime-street*, in *London* aforesaid, feloniously did falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged and counterfeited, and willingly act and assist in the false making, forging and counterfeiting upon the back of the said bill of exchange AN ACCEPTANCE in writing of the said bill of exchange, purporting to be the acceptance of the said *John King*, of the said bill of exchange, which said false, forged, and counterfeited acceptance, is to the TENOR and EFFECT following (that is to say) " *John King*, A. with intention to defraud *William Dalby* and *Richard Brewer*, against the form of the statute in such case made and provided, against the peace, &c."

THERE was a second count in the same form for uttering it knowing it to be forged, with the like intention.

IT was proved that the prisoner negotiated the bill, which was directed to *John Ring*, and accepted on the back of it by *John King*, and that he told *Mr. Dalby* the prosecutor, who advanced money on it, that *Mr. King* was a man of fortune living in *Berkeley-street*, *Portman-square*, but it appeared that no person of that name was to be found there.

THE Jury found the prisoner guilty on the second count, and not guilty on the first. But an objection occurred to the

1793. Court, that as the bill did not upon the face of it *purport* to be directed to *John King*, but to *John Ring*, the indictment was defective, and could not be cured by the evidence.

READING'S CASE.

THE case was accordingly reserved for the consideration of THE TWELVE JUDGES, on a question whether the bill of exchange was properly described in the indictment, and whether the offence as laid had been legally proved.

MR. JUSTICE BULLER, in February Session 1794, delivered the opinion of the Judges.—The doubt arose on that part of the indictment which states the bill to *purport* to be directed to one *John King*, by the name and description of *John Ring*, Esq. Now it is clear that where an instrument is to be set forth, the description that it *purports* a particular fact, necessarily means that what is stated as the purport of the instrument, appears on the face of the instrument itself. On the face of the bill of exchange in the present case, and the face of the bill is the only thing to be considered, nothing more appears, when we examine the averment, than that it is a bill of exchange drawn by *John White* on *John Ring*; therefore when the indictment says that it was drawn on *John King*, by the name and description of *John Ring*, it is absurd and repugnant to itself, for the name and description of one thing cannot purport to be another thing (*a*). The drawer of the indictment was led into this blunder by not considering what was the original state of the bill, and what was the appearance of it after the acceptance was put on it; it seems as if he did not recollect under what terms or by whom a bill of exchange may be accepted. Though the bill was drawn on *John Ring*, it might have been accepted by *John King*, for a bill may be accepted by other persons than those to whom it is directed, as when it is accepted for the honour of the drawer, or of any of the indorsers. This blunder therefore, which makes the indictment absurd and repugnant in itself, is, in the opinion of all the Judges of England, a sufficient reason for arresting the judgment against the pri-

(*a*) See the case of Micah Gibbs and the Cases there quoted. 1 East's Term Rep. 180, 181.

soner. But as the opinion is founded not on any proof of his innocence, but merely on the informality of the record, the prisoner may be again indicted for this offence, and therefore must be detained in custody for that purpose until the end of the Sessions. 1793.

READING'S CASE.

THE prisoner remained in custody until the month of March 1794, when he received a free pardon, and was discharged.

THE KING *against* DANIEL HOLT.

CASE CCLXV.

AT the Summer Assizes for Newark, in the year 1793, *Daniel Holt* was tried and convicted before MR. JUSTICE WILSON, upon AN INFORMATION exhibited against him by the Attorney General for a libel, intitled, "A letter addressed to the addressors on the late proclamation."

Immaterial averments in an indictment need not be proved.—THE GAZETTE, purporting to be printed by the King's printer, is good evidence of all *acts of state* therein contained.

THE information stated, "That before the publishing of the libel therein after-mentioned, to wit, &c. our Lord the King, by the advice of his Privy Council, had issued his royal proclamation, whereby, &c. (reciting the proclamation) that after the said proclamation had been issued, and before the publishing of the seditious libel therein after-mentioned, divers addresses had, on occasion of such proclamation, been presented to his said Majesty by divers of his loving subjects, expressing their loyalty and attachment to his said Majesty, and the government and constitution of this kingdom, &c." It then proceeded to state that the defendant, well knowing the premises, &c. but maliciously and seditiously intending to bring the said proclamation into contempt, &c. and to stir up sedition, &c. published the libel in question, (setting the libel forth, and averring the word "proclamation" to mean "his said Majesty's proclamation)."

ON the defendant's being brought up to the Court of King's Bench in Michaelmas Term 1793 for judgment, *a new trial* was moved for, on several objections, one of which was, that the allegation that divers addresses had been presented to the King, &c. was not proved at the trial; the only

1793.

HOLT'S CASE.

proof of it being the production of THE GAZETTE, in which it was stated, that such addresses (stating them) had been presented to the King.

BUT THE COURT were unanimously of opinion, that the evidence was in this case sufficient; for that THE GAZETTE is an authoritative means of proving all acts relating to *the King* and *the State*; and MR. JUSTICE BULLER cited *Rex* v. *Franklin* (1), where the Court admitted the Journals of the House of Lords, not only to prove the address to the King, but the King's answer to the House; and the case of *the King* v. *Withers* (2), which was an indictment for murder tried before him at *Stafford*. The prisoner, a common soldier, was indicted for the murder of a serjeant of the same regiment. It became a material question to consider how far he was to be obedient to his serjeant, which depended on THE ARTICLES OF WAR, and the prosecution being strangely neglected, the articles of war were not produced at the trial: It occurred to the learned Judge, that there was great reason to doubt on the propriety of the conviction founded on this defective evidence, and he reserved the case for the opinion of the Judges, who thought that the articles of war ought to have been produced; and if they had been produced, *as printed by the King's printer*, it would have been sufficient evidence. But in the principal case he was of opinion that the prosecutor had no occasion to have given any evidence at all of these addresses; for that the averment respecting these addresses seemed unnecessary; the information, after stating the proclamation, and the addresses, charging the defendant with *a seditious intent to bring the said proclamation into contempt*, without noticing the addresses again; and the distinction between *material averments* and *immaterial averments* being perfectly well settled, *viz.* that if the averment be material, that is, if it be connected with the charge, it must be proved; but if it be totally immaterial, as if *the libel* be not connected with *the averment*, it need not be proved.

(1) 9 State Trials, 259.

(2) On 17th Nov. 1784.

THE defendant was sentenced to pay a fine of fifty pounds; to be committed to Newgate for two years; and to find sureties for his good behaviour for five years afterward.

1793.

THE KING *against* BLAND.

CASE CCLXVI

A person convicted of concealing naval stores, or of having them unlawfully in his custody, may receive the *corporal punishment* directed by the statute 17 Geo. II. c. 40. s. 10. although he is ready and offers to pay the penalty of 200*l.* inflicted by the 9 & 10 Will. III. c. 41.

S. C. 2 East, 760.

THE defendant had been convicted on an indictment, the first count of which charged him with concealing naval stores, and the second with having them in his custody (*a*); and on being now brought up to receive the judgment of the Court, the Counsel for the prosecution moved that he might receive a corporal punishment.

THE statute 9 & 10 Will. III. c. 41. s. 2. enacts, That such offenders shall forfeit such goods, and the sum of two hundred pounds, together with the costs of prosecution; one moiety to his Majesty, and the other moiety to the informer, to be recovered by action of debt, bill, plaint, or information, in any of the Courts of Record at *Westminster*; and shall also suffer imprisonment until payment and performance of the said forfeiture."

THE statute 9 Geo. I. c. 8. s. 3. after reciting, "That by the 9 & 10 Will. III. c. 41. a penalty of two hundred pounds, with costs of prosecution and pain of imprisonment, is inflicted on persons having in their custody, possession, or keeping, or concealing any naval stores, contrary to the said Act, and that it is necessary to give a power to mitigate the said penalties," provides by sect. 4. "That it shall and may be lawful to and for any Judge, Justice or Justices, before whom any offender shall be convicted of the said crimes, to mitigate *the penalty* for the same as he or they shall see cause, and to commit the offender so convicted to the common gaol of the county or place where the offence shall be committed, there to remain, without bail or mainprize, until payment be made of the penalty and forfeiture imposed by this or the said former Act, or mitigated as aforesaid; or to punish such offender corporally, by causing him, her, or them, to be publicly whipped, or committed to some public workhouse, there to be kept to hard labour for the space of six months, or a less time, as such Judge, Justice, or Justices, in his or their discretion shall see meet, any thing in the 9 & 10 Will. III. c. 41. to the contrary notwithstanding."

(*a*) See Foster's Crown Law, Appendix, 439.

1793.

BLAND'S CASE.

THE statute 17 Geo. II. c. 40. s. 10. after reciting the clauses above stated, and "that some doubts had arisen touching the method of trial and punishment of offenders against the said recited Acts, whether, as the said Acts are worded, such offender may be indicted and tried for the crimes and offences in the said Act mentioned, and whether any Judge, Justice, or Justices of Assize, or Justice of Peace at Session, may hear, try, and determine the same, and on conviction set such fine, or mitigate the same, and the forfeiture and penalties inflicted by the aforesaid Acts on such offender, as the nature of the offences may deserve, or whether such offender, in order for recovering the said forfeiture and penalties inflicted by the said Act, can only be proceeded against by action or suit, &c. in the Courts at *Westminster*," ENACTS, for remedy thereof, and for explaining the Acts above-mentioned, "That Justices of Assize, or Justices of the Peace at the General Quarter Session, may hear, try, and determine such offences, and may impose any fine not exceeding the sum of two hundred pounds on such offender, one moiety to the King, and the other to the informer; and may mitigate the said penalty and forfeiture inflicted by the said recited Acts, or either of them, and commit the offender until payment, OR *in lieu thereof* may punish such offender corporally, by causing him to be publicly whipped, and committed to some house of correction or public workhouse, there to be kept to hard labour for three months, or less time, as such Judge or Justices shall in his or their discretion see meet (*a*)."

(*a*) See also 39 & 40 Geo. III. c. 89. s. 1. which recites the preceding statutes upon the subject of naval stores, and enacts that every person not a contractor, &c. who shall knowingly *sell or deliver* or *receive or have* in his possession any naval, ordnance, or victualling stores, &c. in a raw state, or new, or not more than one third worn, and such person shall conceal the same, shall be deemed a receiver of stolen goods knowingly and be transported for 14 years, unless he produce a certificate from the commissioners, &c. accounting for such stores.—And it further enacts, that persons convicted of any offence contrary to 9 & 10 Will. III. c. 41. shall besides the forfeiture of 200*l.* (which may be mitigated) suffer corporal punishment. See also Cole's Case, Winchester, March 1801, before Le Blanc J. 2 East's C. L. 767.

1793.

BLAND'S CASE.

THE defendant's Counsel insisted that the Court had no authority, under any or all of these statutes, to inflict a corporal punishment, if the defendant could pay the penalty; and that if it had, the Court would not in their discretion exercise such a power in the present case: and they argued it upon *the merits*.

BUT THE COURT said it was impossible to raise any serious doubt respecting the power of inflicting corporal punishment; for that the words of the statute were in the disjunctive, enabling them either to impose a penalty, OR to punish the offender corporally.

B. R. Mich. Term, 1793.

THE defendant was sentenced to *Clerkenwell* prison for three months, there to be kept to hard labour, and during that time to be publicly whipped on *Clerkenwell Green* for the space of ten yards.

THE KING *against* JAMES LYON.

CASE CCLXVII.

AT the Old Bailey in December Session 1793, *James Lyon* was indicted for forging a *scrip receipt* for 2000*l.* 3 per Cent. Consols.

In an indictment for forgery the instrument charged to be forged must be set out, that the Court may see whether it be an instrument within the statutes against this offence.—A *scrip receipt*, not filled up with the name of the *subscriber*, is not a receipt for money within the statutes against forgery.—See Rex *v.* Reeves, *post*, Jan. Sess. 1798.—S. C. 2 East, 933.

THE indictment charged, "That *James Lyon*, late of *London*, labourer, heretofore, to wit, on the fourth day of November, in the thirty-fourth year, &c. with force and arms, at *London* aforesaid (that is to say), at the parish of *St. Christopher le Stocks*, in the ward of *Broad-street*, in *London* aforesaid, feloniously did falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, and willingly act and assist in the false making, forging, and counterfeiting a certain RECEIPT FOR MONEY, the tenor of which said false, forged, and counterfeited RECEIPT FOR MONEY is as followeth; that is to say,

1793.

LYON'S CASE.

"£.2000 THREE PER CENT. ANNUITIES 1793.

"C. No. 236.

"By virtue of a resolution of THE HOUSE OF COMMONS for raising "£.4,500,000 for the Service of the Year 1793.

"RECEIVED of the sum of one hundred and forty-four pounds for the deposit of 10*l.* per cent. on fourteen hundred and forty pounds, subscribed by him in pursuance of the abovesaid resolution; and upon due payment of the remaining 90*l.* per cent. of the said sum of fourteen hundred and forty pounds, the said subscriber, or his assigns, by indorsement hereon, will in exchange for this RECEIPT become intitled to TWO THOUSAND POUNDS, joint-stock of 3*l.* per cent. Annuities, which were consolidated at the Bank of England, by certain Acts made in the 25th, 28th, 29th, 32d, and 33d year of the reign of his late Majesty King George the Second, and by several subsequent Acts, the interest to commence from the 5th day of January 1793. Every subscriber, who shall complete the payment of his subscription on or before the 12th day of December next, will be allowed a discount after the rate of 3*l.* per cent. per annum upon the sum so completing his subscription, from the day of paying it to the 24th day of January next. Witness my hand, this 4th day of April 1793. £.144

ENTERED. *W. Johnson.* T. THOMPSON.

"31st May.

Received one hundred and forty-four pounds for second payment — — — — — £.144

ENTERED. *W. Smart.* T. THOMPSON.

"19th July.

Received one hundred and forty-four pounds for third payment — — — — — £.144

ENTERED. *S. Simpson.* J. PADMAN.

"16th August.

Received one hundred and forty-four pounds for fourth payment — — — — — £.144

ENTERED. *W. Smart.* T. THOMPSON.

"27th September.

Received two hundred and sixteen pounds for fifth payment — — — — — £.216

ENTERED. *W. Johnson.* T. THOMPSON.

with intention to defraud the Governor and Company of the Bank of England, against the form of the statute in such case made and provided, and against the peace of our said Lord the King, his crown and dignity."—THE SECOND COUNT

charged him with having knowingly uttered it with the like intention; and the instrument was set out at length in the same words and figures as in the first count. THE THIRD COUNT charged, "That he, &c. with force and arms, &c. feloniously did falsely make, forge, and counterfeit, &c. a certain other RECEIPT FOR MONEY, with the name of *T. Thompson* thereunto subscribed, the tenor of which said last-mentioned false, forged, and counterfeited RECEIPT FOR MONEY is as followeth; that is to say, "2000*l.* three per cent. Annuities, 1793. C. No. 236. by virtue of a resolution of THE HOUSE OF COMMONS for raising 4,500,000*l.* for the service of the year 1793. RECEIVED of
the sum of one hundred and forty pounds for the deposit of 10*l.* per cent. on fourteen hundred and forty pounds, subscribed by him in pursuance of the above said resolution; and upon due payment of the remaining 90*l.* per cent. of the said sum of fourteen hundred and forty pounds, the said subscriber or his assigns, by indorsement hereon, will, in exchange for this RECEIPT, become intitled to TWO THOUSAND POUNDS joint-stock of 3 per cent. Annuities, which were consolidated at the Bank of England by certain Acts made in the 25th, 28th, 29th, 32d, and 33d year of the reign of his late Majesty King George the Second, and by several subsequent Acts, the interest to commence from the 5th of January 1793. Every subscriber, who shall complete the payment of his subscription on or before the 12th day of December next, will be allowed a discount after the rate of 3 per cent. per annum upon the sum so completing his subscription, from the day of paying it to the 24th day of January next. Witness my hand, this 4th day of April 1793, T. THOMPSON. ENTERED. *W. Johnson.*" with intention to defraud the Governor and Company of the Bank of England, against the form of the statute,"&c.—THE FOURTH COUNT charged him with having knowingly uttered the said Receipt with the like intention, setting it out in the same words and figures as in the third count.—There were EIGHT OTHER COUNTS, charging the prisoner with having forged and uttered the said RECEIPTS FOR MONEY, setting them out re-

1793. LYON'S CASE.

spectively as in the first and third counts, with intention to defraud, 1st, *Peter Martin*; and 2dly, *Francis Barroneau*. There was also another indictment against him, consisting of sixteen counts, for forging and uttering another *scrip receipt* of the like kind, with intention to defraud the same persons as were mentioned in the former indictment; and also, 1st, *Richard Bannister*; and 2dly, *John Perkins*.

To these indictments the prisoner *demurred*, on the ground that the instrument forged was not A RECEIPT FOR MONEY, inasmuch as it was not filled up with the name of the subscriber or person from whom the money was received.

THIS demurrer was argued in January Session 1794, before the JUDGES at THE OLD BAILEY, by KNOWLYS *for the prisoner*, and by GILES *for the Crown*.

KNOWLYS, *for the prisoner*. The statute 2 Geo. II. c. 25. upon which the essential part of this indictment is founded, enacts, "That if any person shall falsely make, forge, or counterfeit, &c. any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement, or assignment of any bill of exchange or promissory note for payment of money, or any *acquittance* or *receipt*, *either for money* or goods, with intention to defraud any person whatsoever, every such person shall suffer death as a felon without benefit of clergy." The indictment charges the prisoner with having forged a *receipt for money*, and then sets out, as it must necessarily do, THE TENOR of the instrument which is so charged to have been forged as a receipt for money; but it is neither an *acquittance*, nor *a receipt for money*, within the meaning of the above statute: and if the instrument as set out shall appear to the Court not to be a receipt for money, the circumstance of the defendant having demurred to the indictment, will not make it one, for a demurrer only admits those facts that are well pleaded to be true, and this instrument is not well pleaded as a receipt for money. A receipt to become the subject of forgery within the meaning of this statute must be a valid receipt to all purposes of law, but the present instrument carries no legal effect on the face of it; it

1793.

LYON'S CASE.

does not purport to be an *accountable* receipt, for it does not import *of whom* any money was received, nor does it *acquit* any person of any antecedent demand. To constitute a receipt, there must not only be a receiver, but a person of whom money is received; but in the present case the place in which the name of *the payer* ought to have been inserted is left *blank*, and this circumstance of itself shews, that to make this a valid receipt both the names of *the payer* and *the receiver* ought to have been inserted. If this had been a genuine instrument, it could not in its present state have had any legal operation or effect, for want of the name of a person *to whom* it was to operate as a receipt or acquittance; and in an action for money had and received, there must have been other evidence to support it, and not having the effect of a receipt *proprio vigore*, it cannot be a legal receipt. In the case of *Rex* v. *Newton* (1), which was an indictment on the 5 Eliz. c. 14. for forging a deed, it was objected, that it was not averred to be sealed, and the Court, after taking time to consider and search for precedents, determined the objection to be good according to the doctrine of *Sir Edward Coke* (2), who says, that in such an indictment it must appear that the deed was sealed; for that no deed, charter, or writing, can have the force of a deed without a seal; and the name of the person of whom money is received, is as essential to the validity of a receipt, as sealing is to the validity of a deed. In the case of *Rex* v. *Goddard* (3), which was an indictment for forging an assignment of a lease, where the tenor of the assignment was set out, at the bottom of which there was *the mark of the assignor*, for he could not write his name, but no mark appeared on *the postea*, and an objection was taken on account of there being no *mark* on the *postea*, which was agreed to be a good exception by the whole Court, for that a lease is not assignable without a writing signed by the party (4). In the case of *Rex* v. *Moffatt* (5), it was held that forging a bill of exchange for payment of three guineas was not a capital forgery, because as it did not specify the *place of abode of the payee*, it was the forging of an instrument which was void as a bill of exchange; and Mr. Justice Ashhurst, in delivering the opinion of

(1) 3 Keb. 388.

(2) 3 Inst. 169.

(3) 1 Salk. 342. 3 Salk. 171. 2 Ld. Ray. 920.

(4) See the Statute of Frauds, 29 Car. II. c. 3.

(5) *Ante*, page 431. Case 200.

1793.

LYON'S CASE.

the JUDGES in this case, says, "The bill of exchange, if real, "would not have been valid or negotiable, and therefore the "forging of it is not a capital offence." So, also, MR. BARON EYRE, in the case of *Mary Jones* and *Henry Palmer* (1), says, "The definition of forgery is the false marking an in- "strument which purports, *on the face of it, to be good and* "*valid for the purposes for which it was created.*" But does the instrument in the present case purport, on the face of it, to be good and valid? It certainly does not; it appears on the face of it to be imperfect, and to want an essential part to give effect and vigour to it: nobody could make a claim of stock by virtue of such a receipt, because it applies to nobody; and the forging a name to the indorsement would not make the case better, because it does not appear that the person who assigns it is a subscriber. In the case of *Rex* v. *Jones* (2), who was indicted for uttering a certain forged paper writing, purporting to be a bank-note, but the note as set out in the indictment was, "I promise to pay to *J.* "*Usher, or bearer, ten pounds for self and Co. of my bank of* "*England:*" and the Court was of opinion, that although the prisoner had uttered it as a bank-note, yet as it did not appear on the face of it to be a bank-note, he was not guilty of felony. The principle therefore is, that to constitute forgery the instrument must be of that kind that if it were real it would be legally valid. The statutes of 2 Geo. II. c. 25. and 7 Geo. II. c. 22. relate to other instruments as well as to receipts; and if this had been an indictment for forging a bill of exchange or a promissory note, and no payee had been named in the bill or note, could they have been deemed respectively the instruments which the indictment would have charged they purported to be; or could they, if set out, as they must have been, in such form, be deemed valid and negotiable instruments? The merely counterfeiting a name will not constitute forgery; the crime can only be committed by inserting the name of another in an instrument in such a manner as to make it a false instrument. Suppose a man were to drop out of his pocket a check or draft signed but not filled up with a name, or other word designating a person as its payee, the mere signature of such a name, though not the name of

(1) *Ante*, page 366, Case 178.

(2) *Ante*, page 204. Case 103.

1793.

LYON'S CASE.

the writer, would not be forgery; nor could such a paper writing be called an order for payment of money within the statute of 7 Geo. II. c. 22. In *Mary Mitchell's Case* (1), the indictment was on this statute for forging an order for delivery of goods, but it being, "*I desire you will let "this woman have six yards of stuff, and I will see it paid "for*," it was held not to be an order for delivery of goods, because it would not, if genuine, have been compulsory on the person to whom it was addressed; and the law of this case is confirmed in the case of *Rex* v. *George Williams* (2), *Rex* v. *Ellor* (3), and *Rex* v. *Clinch* (4). The instrument must be such as is capable of effecting the meditated fraud; but how was it possible for any person to be defrauded by such an instrument as is set forth in the present indictment? It is impossible that any person, using that common care and caution which the law expects every man to use in his transactions with others, could have been defrauded by it; for on inspection it appears to be no receipt, but merely a piece of waste paper, and the fact was, that the moment this omission of the name of the subscriber from whom the instrument supposes the money to have been received, was observed, all further transaction on the subject ceased.

(1) Foster, 119.

(2) *Ante*, page 114, Case 69.

(3) *Ante*, page 323. Case 156.

(4) *Ante*, page 540. Case 244.

GILES, *for the Crown*, after observing on the novelty of a demurrer to an indictment for felony, and the uncertainty of the law with respect to the judgment against a prisoner in such case being final and conclusive (5), contended that it was at least a provisional admission of the truth of every thing alleged in the indictment; but that, although the indictment alleged the instrument stated to be forged to be a receipt for money, yet that if, upon the face of the record, it should appear not to be the instrument which the statute 2 Geo. II. c. 25. describes, it might, he admitted, be taken advantage of under the present pleading. The question, therefore, is, Whether this instrument is what the indictment calls it; the forging of which the Legislature intended to prevent, namely, *a Receipt for money?* not, indeed, whether it be a receipt for money of such and such a particular description, but whether it satisfies the general description in the statute, "an acquit-"tance or receipt for money?" A receipt is described by Dr.

(5) 2 Hawk. P. C lib. 2. cap. 31. page 470. 4 Bl. Com. 328. 2 Hale, P. C. 157.

1793.

LYON'S CASE.

Johnson to be "a note given, by which money is *acknowledged* "to have been received." But it is contended, that this is not a receipt for money, because it does not state *from whom the money was received.* This, indeed, might have been contended with some degree of truth, if the indictment had alleged it to be *an acquittance*; for an acquittance is defined to be "declaration par ecrit que l'on donne à quélqúun, et par "laquelle on le tient *quitte* de quelque somme d'argent ou de "quelque *autre redevance.*" But it is not necessary to constitute *a receipt* that it should appear *from whom* the money was received; that is a circumstance that does not necessarily form a part of a receipt for money. An acquittance is intended *ex vi termini* to acquit or discharge *the person* to whom it is given, from *a claim* of the party giving it; and therefore the person to be acquitted or discharged must *necessarily* be mentioned; but a receipt for money is an acknowledgment that the party subscribing it has received the sum specified. Receipts vary in their forms, according to *the circumstances* which are to be introduced into them, as the *time*, the *place*, the *account*; all which are introduced for the convenience of the parties, but are mere *accidents*, and do not make them more or less receipts for money. Suppose, what is certainly a possible case, that *Thompson* had hired goods from another person, and that the time of redelivering the goods was fixed to be as soon as he, whether as agent for another or not, should receive 144*l.* from any person or persons whatever; in an action against *Thompson* for not delivering the goods, the production of a receipt in the following terms, "1st Jan. "1794, Received by me, 144*l.* *J. Thompson*" would be evidence against him of the receipt of the money; and so also would the paper in question, if it had been genuine. Suppose *Thompson* to have promised, in consideration of a sum of money paid by another person to him, to pay such other person a sum equal to the amount of what he should, whether as agent or not, receive in the month of April 1793, *at London*, such a receipt as before stated would be evidence of the receipt of the money at *the time*, and *the place* must be supplied by other evidence. Again, let his promise be to pay what he should receive in April 1793 *on account of scrip*, the

receipt as above described would be evidence of the sum; and *the account* on which it was received must be introduced by other evidence; but the paper in question, if genuine, would be evidence of *sum* and *account* of itself. If it were by the terms of such contracts necessary to shew from whom the money was received, the written evidence would fall short, and must be supplied by parole. Suppose a tradesman's bill were made out to a customer without inserting the name of the customer, and the tradesman, on receiving its amount, were only to under-write "*Received the above sum, A. B.*" this would certainly be a receipt for money, although the name of the person from whom it was received was not mentioned therein, and might, on proof by other evidence that it was received from him, be produced as strong *primâ facie* evidence of payment. In the case of *Rex* v. *Harrison*, the indictment charged the prisoner with having forged a receipt for money in the words, "letters, figures, and cyphers following, *to wit*, 1777, June 16, Bank-notes, C. 3,210*l.*" This was all that appeared on the record. There was nothing on the record to shew from whom it was received; and the JUDGES were of opinion, that this was a receipt for money within the meaning of the statute: and the present paper, if genuine, would charge *Thompson* or the Bank with the receipt of 144*l.* though it would not of itself shew on whose account the money was received. If it be said, that this paper is not like those receipts which are complete without the name, because they do not profess to insert it, and that this is *in blank*, and therefore, if genuine, it would be invalid, I contend, that it is still a receipt for money, because it might for many purposes be made use of as such, namely, as evidence against *Thompson* or the Bank, of the receipt of 144*l.*; for it is a receipt for money by them, although it do not express from whom they received it; and therefore, although it may not of itself be sufficient to answer the purposes it would have served if the name had been inserted in it, it is not on account of this omission wholly void. There are many cases in which this Court has taken a distinction between instruments which are *wholly void*, and those

Ante, p. 180. Case 91.

1793.

LYON'S CASE.

which are incomplete or defective in form. In the one case the instrument has been holden, of course, not to be sufficient to satisfy the description given of it, because being void, it is in law no instrument at all; but in the other case, the want of form has been holden not to alter the nature or denomination of the paper set forth. In the case of *Rex* v. *Moffatt* (1), it was holden that a bill drawn contrary to the form required by the statute 17 Geo. III. c. 30. cannot be the subject of a capital forgery, because being made void by the statute, it is no bill of exchange; but on the other hand, in the case of *Rex* v. *Hawkswood* (2), it was holden, that a bill of exchange, though not stamped according to the direction of the Legislature, was still a bill of exchange, and being forged rendered the offender guilty of a capital offence; for that, if the paper set forth in the indictment would, if genuine, be the thing it is described to be, such a want of form is no objection to it: and the same rule prevails when the thing forged is in other respects incomplete *from design*, as in the case of a blank indorsement on a promissory-note or bill of exchange (3). But the case of *Rex* v. *Elliott* (4) is still stronger, for there the deficiency appeared to be the effect of mistake, though the omission certainly prevented the instrument from appearing on the face of it to be that which it wa described to be. It was an indictment for forging *a Bank-note*, which was drawn thus; "I promise to pay to *J. C.* or "bearer, on demand, the sum of *Fifty*," without adding pounds either in words, or signifying them by figures, in any part of the note; yet it was holden to be a note for payment of money. It appears, therefore, to be sufficient if the instrument *purports* to be one of those instruments described in the statute, *viz.* "a deed, will, testament, bond, writing obligatory, bill of exchange, promissory-note for payment of "money, or *any* acquittance or receipt either for money or "goods;" and may be so laid in the indictment, as appears by the case of *Rex* v. *Birch* and *Martin* (5). In the case of *Rex* v. *Bigg* (6), the defendant was indicted on the statute 8 & 9 Will. III. c. 20. s. 36. which makes the altering or erasing any indorsement on a Bank-bill or note, of any sort,

(1) *Ante*, page 431. Case 200.

(2) *Ante*, page 257. Case 129.

(3) Rex v. Bolland. *Ante*, p. 83. Case 47.

(4) *Ante*, page 176. Case 90.

(5) *Ante*, page 79. Case 44.

(6) 1 Stra. 18.

felony without benefit of clergy. The indictment stated that the note was made and signed for 100*l.* payable to *James White* or bearer; that 90*l.* thereof had been paid to the bearer, and indorsed upon the said note; and that this defendant had *erased* the said indorsement. It appeared that he had, by means of a certain liquor, totally expunged the words, letters, and figures of the indorsement; that from the time of passing the statute to the year 1697, the Bank had written the indorsements on the back-side of their notes with black ink; but that since that year they had written the payment on the face of the notes, across the writing, in red ink; and that this had been called an indorsement: and it was held that the defendant was guilty; for that the writing on *the face of the note* was of the same effect as an *indorsement*, and being introduced by the Bank in the stead of writing on the back, and being always accepted and taken to be an indorsement, it was within the words of the indictment. But it is asked how this paper could, in its present state, be used to defraud. The answer to this question is furnished by the fact, for it did in fact defraud one of the persons named in the indictment, and if the prisoner had pleaded Not Guilty, it is a fact that would have been proved most clearly to the Jury, and which, indeed, he has by this demurrer admitted to be true. This question is also answered by the *Case of Anne Lewis*, which was an indictment for forging a power of attorney from *Elizabeth Tingle*, administratrix of her father *Richard Tingle* deceased; and it appeared, that *Richard Tingle* had died childless and unmarried, so that no such person as *Elizabeth Tingle*, the daughter of *Richard Tingle*, existed in *rerum naturâ*; but it was held to be a forgery within the very statute on which the eight last counts of the present indictment are founded. *Sir Michael Foster* says, "It may be said *cui bono*; to what "purpose will it be to forge deeds or other instruments in the "names of persons who never existed?" but he adds, "The naked state of the case answers the question;" and by the naked state of the present case might MR. KNOWLYS's question be answered, if it were now competent to him to put it,

Foster, 116.

1793.

LYON'S CASE.

which it is not: for the prisoner having declined to plead, and thereby prevented the Crown from proving his intent to defraud, by shewing the manner in which he effected it, he cannot, upon demurrer, object that the transaction is not stated in the record; nor, as it appears from the case of *Rex* v. *Powell* (1), is it necessary to aver any more than a general intention to defraud.

(1) *Ante*, page 77. Case 48.

THE case was reserved for the opinion of the TWELVE JUDGES.

MR. JUSTICE GROSE, on the 22d May 1795, delivered the opinion of the JUDGES to the following effect. This indictment charges the prisoner with having on the 4th November 1793, feloniously made, forged, and counterfeited, a certain receipt for money, the tenor of which is set forth in the indictment, and it purports to be in the form of what is called *a scrip receipt* from *T. Thompson*, one of the cashiers of the Bank, for five payments, or subscriptions, on two thousand three per cent. consols, or as stated in some of the counts, for the sum of 144*l.* for the first subscription on the said stock; and it is laid to have been forged and uttered with an intention to defraud the Bank of England and the two gentlemen named in the indictment. To this indictment the defendant has demurred, on the ground that the instrument, the tenor of which is set forth in the indictment, is not in contemplation of law *a receipt for money* within the meaning of 2 Geo. II. c. 2. because the name of the original subscriber, who is supposed to have paid this money to the cashier, is not inserted in any part of the instrument, but the place where such name ought to be inserted is left wholly blank and unfilled. In every indictment for forgery the instrument charged to be forged must be set out according to its *tenor*, in order that the Court may see that it is the instrument which it *purports* by its *tenor* to be; and that it is one of those instruments, the falsely making, or knowingly uttering of which, the law has said shall be considered forgery (*a*). The question therefore is, whether the

(*a*) This point was ruled before all the Judges in Trinity Term 1767, in the Case of *Rex* v. *Lloyd* on an indictment for sending a threatening letter; and in Trinity Term 1793, in the Case of *Rex* v. *James Mason*, who

1793.

LYON'S CASE.

instrument set forth in the present indictment is, in contemplation of law, a *receipt for money* within the meaning of the statute, and the JUDGES are of opinion, that it is not. It is the duty of the cashier, appointed by the directors of the Bank to receive these kind of subscriptions, to fill up the receipts with the names of the subscribers or persons from whom they originally receive the money; for until the blank left in the printed form be so filled up, the instrument does not become an acknowledgement of payment, or in other words, a *receipt for money*. If any assignee of the stock, or other person, take such a paper without the subscriber's name being inserted therein, he has no reason to complain of it as a fraud, because, if fraud ensue, it is the consequence of his own negligence, for if he had merely looked at it he must have perceived that it was nothing more than waste paper. It is, while in such a state, no more a receipt than if, instead of the name of the original subscriber being omitted, it had omitted to state the sum professed to be received. The second count only sets out the first receipt, and it was said, that for any thing that appears to the contrary it may be a receipt for money from the assignee of this stock, but the same objections apply to this count as were made to the instrument as stated in the first count. It was said, that this instrument appears to be as much *a receipt*, as that did which was set forth in the case of *Rex* v. *Harrison*, namely, "1777, *June* "16, *Bank-Notes*, *C.* 3210*l.*" but in that case, the book in which the entry was made imported to be a book containing receipts for money received by the Bank from their customers, and therefore shewed that the money was received from the party to whom the book belonged.

Ante, p. 180. Case 91.

THE prisoner was accordingly discharged.

was tried before MR. BARON THOMPSON at the Summer Assizes for the county of *Northumberland* in 1792, on an indictment for forging a bill of exchange. 1 East Rep. 180 *notis*. See this last Case stated more at large, 2 East C. L. 975.

1794.

CASE CCLXVIII.

If a person be induced to play at *hiding under the hat*, and stake down his money voluntarily on the event, meaning to receive the stake if he wins and to pay it if he loses, the taking up of the stakes so deposited by him on the table, is not a felonious taking, although the party was made to appear to win the money by fraudulent conspiracy and collusion. S. C. 2 East, 669.

THE KING *against* NICHOLSON, JONES, AND CHAPPEL.

AT the Old-Bailey in January Session 1794, *Thomas Morris Nicholson*, *James Jones*, and *William Chappel*, were tried before SIR ARCHIBALD MACDONALD, KNT. Chief Baron of the Exchequer, present MR. JUSTICE GROSE and MR. JUSTICE ROOKE.

THE indictment charged, that they, on the 2d November 1794, one promissory note called a bank post bill, value twenty pounds, &c. and one other promissory note called a bank post bill, value fifteen pounds, &c. and also seven guineas, the property and monies of *William Cartwright*, feloniously did steal, take, and carry away.

THE EVIDENCE.—*William Cartwright*, the prosecutor, had, on the 15th June 1794, received the notes and money mentioned in the indictment from THE EARL OF MANSFIELD, with whom he had long lived in the capacity of bailiff, and by whose interest he had been on the same day admitted a pensioner in the Charter-house, where he had locked up these savings of his industry in a desk in the room which was appropriated to him by the managers of that charity. On the 2d of November following a man, who it afterwards appeared was the prisoner *Nicholson*, but whom he had never seen or known before, called on the prosecutor, and pretending that he had an acquaintance whom he wanted to get into the Charter-house, desired to see the rules. The prosecutor desired him to walk up stairs into his room, and opening his desk, which *Nicholson* seized this opportunity of looking into, took out the rules and gave them to *Nicholson*, who perused them and said they were very good, and that he liked them very well. *Nicholson* having familiarised himself with the prosecutor, proposed that they should take a walk together, to which the prosecutor assented, and *Nicholson* conducted him to a public-house in an adjoining street. On entering the public-house a person, whom the prosecutor afterwards found to be *Chappel*, addressed himself to *Nicholson*, saying,

" *Have you seen any thing?*" " *Yes,*" replied *Nicholson*, " *I* " *have seen what I am very well satisfied with, and I have got* " *what I want.*" *Nicholson*, accompanied by *Cartwright* and *Chappel*, then went into a room, and while each of them were drinking a glass of liquor, *Jones*, the other prisoner, entered with a glass of liquor in his hand, saying, by way of apology for his intrusion, " *Gentlemen, I hope no offence.*" *Chappel* replied, " *No, sir, no offence at all.*" *Jones* being thus admitted to the company, entered into conversation, saying, that he was a riband-weaver just come from *Coventry* to receive a legacy of fourteen hundred pounds that had been left to him by his aunt who was lately deceased. *Chappel* asked *Jones* in what situation of life his aunt had made her money? *Jones* replied, " *She farmed a workhouse, and pinched the poor.*" He then pulled from his pocket a quantity of papers like bank-notes, and displayed them with great ostentation to the company; shewing one of them to *Chappel*, who said, " Ay, " I see it is good, but I imagine you think nobody in com- " pany has got any money but yourself." " No," says *Jones*, " I will lay you all ten pounds that you cannot each of you " produce forty pounds in two hours." The parties immediately on this bet being proposed left the room and went into the street, *Chappel* and *Nicholson* telling *Cartwright*, as they went along, that *they* could produce the money within the time if *he* could do the same. *Cartwright* told them he could produce it immediately, and he and *Nicholson* went to his room at the Charter-house, where he opened his desk and took out two notes, a twenty pounds bank post bill, and a fifteen pounds bank post bill, indorsed " *Mansfield*," which, together with five guineas which he took from a little box, made up the forty pounds and five shillings; and on *Nicholson* observing that he had better take enough, he added *two guineas* more to this sum. *Nicholson* and *Cartwright* then walked together until they came to a stand of coaches, where *Nicholson* called a coach, and ordered the coachman to drive them to *the Spotted Horse in Moorfields*, where *Chappel* in the hearing of *Nicholson* had, on leaving the room of the public-house, said he would go. On getting out of the coach and

1794.

NICHOLSON, JONES, AND CHAPPEL'S CASE.

going into a back-room of this house, they found *Chappel* and *Jones* there. Each took his seat at a table that stood in the room, and *Jones* put down a paper of ten pounds for each that could produce forty pounds. *Cartwright* accordingly produced his money, won his ten pounds, and put the paper without looking at it into his pocket. *Jones* then inscribed four letters on the table with chalk, H. O. N. H. went to the farthest end of the room, turned his back to the table, and offered to lay the company a guinea a-piece, that he would name a letter that they were to make by the side of these and to put under a bason. A letter was accordingly made by the side of the four former letters, and a bason was put over the whole. *Jones* named a letter and did not name the right letter, by which he lost a guinea a-piece to the other three. *Jones* proposed to call a letter again, and offered to lay them whatever sum they chose to risk that he would guess right. *Nicholson* said, "*He is sure to lose; we may as well make it "more; I am sure he won't win; we may as well ease him of "the money his aunt left him; he has more than he knows what "to do with.*" *Chappel* also used expressions to the same effect. Various sums were proposed, until *Cartwright*'s mind was so worked up to the hope of gain, that he laid all his notes and the seven guineas on the table. Another letter was then made, and covered with a bason as before, and *Jones* desired to guess again, and he guessed right. *Chappel* exclaimed, "*He is right;*" and *Jones* came to the table and swept the money and notes all off, and went to the door; to which *Cartwright* made no objection, conceiving that he, *Cartwright*, had fairly lost the money to *Jones*.—During these transactions, it happened that three of the Officers belonging to the Police Office in *Worship-street* came accidentally into the house, and observing *Jones* run hastily towards the door, they seized him and brought him back into the room, when, perceiving from the chalks on the table what had been going forward, they took them all into custody. On *Jones* was found four guineas and a half in gold, and a two-guinea-piece, with the bank-notes *Cartwright* had lost, and a great number of flash notes, but no real ones. On *Chappel* was

found eighteen pence, two pieces of paper, and a false note. On *Nicholson* was found a guinea and a half in gold, and a number of flash notes. *Cartwright* had never seen either of these men before; and on his cross-examination he admitted that he intended to gamble; that having won the first wager, he should, if the transaction had ended there, have kept the guinea; that he certainly had the guinea which he won from *Jones*; that he did not object to *Jones* taking his forty-two pounds, seven shillings, when he lost; and that if *Jones* had guessed wrong the second time, he expected to receive from him forty-two pounds seven shillings, the amount of the stake.

KNOWLYS, *for the prisoner*, submitted to the Court, that there was a material distinction between this case and the common cases where money is obtained by means of *ring dropping*; that in ring dropping cases the property obtained, though voluntarily on the part of the prosecutor, was not by an absolute but conditional delivery, so that until something else took place the property was not intended to be parted with, and therefore a constructive possession still remained in the prosecutor; but in this case the money was lost, and the prosecutor really supposed it to be so, and parted with it absolutely without any thing being to be afterwards done by the party, or without any expectation of its being to be returned to him again in any event whatever.

THE COURT was of opinion, that it was for the Jury to judge from all the circumstances of the case, whether the prisoners had not a dominion over the property of *Cartwright* from the very beginning of the transaction; and whether all that followed were not merely means made use of to get his money into their possession.

THE Jury found the prisoners GUILTY; and that it was not a gaming transaction, but a preconcerted scheme in all the prisoners to get from the prosecutor the notes and money; but the judgment was respited, and the case submitted to the consideration of THE TWELVE JUDGES.

IN Hilary Term 1794, all the JUDGES held the conviction wrong, for that in this case *the possession* itself, as well

1794.

NICHOLSON, JONES, AND CHAPPEL'S CASE.

the property had been parted with by the prosecutor, under an idea that it had been fairly won: and the prisoners received a free pardon, and were discharged previous to the April Session 1794.

CASE CCLXIX.

THE KING *against* JOHN PARKES.

If a tradesman *sell* a stranger goods, enter them to his debit, and make out a bill of parcels for them as goods sold, and the goods are delivered to the purchaser by the servant of the seller, who receives bills for them, it is not *felony*, although the tradesman sold them for ready money, never intended to give the stranger credit, and it appear that the prisoner had taken the apartments to which he ordered them to be sent, for the purpose of obtaining them fraudulently.

S. C. 2 East, 671.

AT the Old Bailey in January Session 1794, *John Parkes*, otherwise *John Williams*, was indicted for feloniously stealing on the 12th September, a piece of black silk mode, of the value of ten pounds, the goods of *Thomas Wilson*.

THE prisoner, on the 12th September 1793, called at the warehouse of Mr. *Wilson*, a silk-manufacturer in *Bread-street*, in *Cheapside*, and desired to look at some black silk. Pieces of silk of various qualities were accordingly shewn to him. He selected the piece mentioned in the indictment, agreed for the price of it, told Mr. *Wilson* that his name was *John Williams*, that he lived at No. 6, *Arabella-row*, in *Pimlico*, and that if Mr. *Wilson* would send it there at six o'clock in the afternoon with a bill and receipt, he would pay him for it. Mr. *Wilson* accordingly entered this piece of silk in his day-book to the debit of the prisoner, made out a bill of parcels for it in his name, and sent his servant with it to the place, and at the hour appointed. The servant carried the goods and bill of parcels to No. 6, *Arabella-row*, where he found the prisoner, to whom he delivered the goods, and presented the bill of parcels, which amounted to 12*l.* 8*s.* The prisoner, after examining the bill and saying it was right, gave the servant two bills of ten pounds each, drawn from *Bradford*, purporting to be signed *J. Frith and Co.* payable on demand at Messrs. *Taylor, Lloyd, Bowman and Co.* The servant took the bills into his hands, and seeing their amount, told the prisoner that he had not sufficient cash about him to pay the difference. The prisoner replied that it was immaterial; that he should want more goods, and that he would call on the ensuing day at his master's to look out what other goods he wanted, and take the change. The servant ac-

1794.

PARKES' CASE.

cordingly left the goods and returned home with the bills, which, the next morning, he gave to Mr. *Wilson*, but on presenting them at *Taylor, Lloyd, Bowman and Co.* it was discovered that they were mere fabrications and of no value; and on inquiry at No. 6, *Arabella-row*, it appeared that the prisoner had only bargained for the lodgings the same morning, and that he absconded with the goods in a few minutes after Mr. *Wilson*'s servant had left the house. Matters remained in this situation from the 12th until the 21st of September, during which interval the entry that had been made in Mr. *Wilson*'s day-book of the sale of these goods to the debit of *John Williams*, was copied into the journal, and from thence posted regularly into the ledger to the debit of the prisoner, according to Mr. *Wilson*'s practice in all cases where goods were not paid for immediately. On the 21st September, Mr. *Wilson*'s servant apprehended the prisoner in *Fleet-street*.

KNOWLYS, *for the prisoner*, submitted to the Court, that as Mr. *Wilson* had sold the goods to the prisoner, made out a bill of parcels to him for them, actually debited him for the amount in his books, and had received notes in payment for them, it was impossible to consider this a felony.

THE COURT left it with the Jury to consider whether there was not in the mind of the prisoner, at the very beginning of this transaction, an original intention to obtain the goods without paying for them. Or whether it was a sale by Mr. *Wilson* and a delivery of the goods with intent to part with *the property*, he having received bills in payment for them through the medium of his servant.

THE Jury found that the prisoner from first to last intended to *defraud* Mr. *Wilson*, and that it was not Mr. *Wilson*'s intention to give him credit: and they found him *Guilty*. On this finding the case was reserved for the opinion of THE TWELVE JUDGES, on a doubt whether this did not amount to such a sale and delivery of the goods as would change the property.

IN Hilary Term 1794, the JUDGES were of opinion that

1794.

PARKES' CASE.

the conviction was wrong, for that *Wilson* had parted with *the property* as well as *the possession* upon receiving that which was accepted by his servant as payment, although the bills afterwards turned out to be of no value: and previous to April Session 1794, the prisoner received a free pardon of the larceny and felony of which he had been convicted.

He was, however, at the same April Session, convicted at Hicks's Hall for obtaining a gold watch from a *Mr. Upjohn* by falsely pretending that he wanted to purchase it; that he lived at No. 27, *Cambden-street, Islington;* and that he would pay for the same on the delivery thereof: and he was ordered to be imprisoned six months in Newgate; and set on the pillory for the space of one hour, in *Holborn*, opposite to *Hatton-garden*, which sentence was executed accordingly.

CASE CCLXX.

REANE'S CASE.

If a prosecutor declare on an indictment of robbery, that he parted with his property without any fear of violence to his person or injury to his character, the prisoner cannot be convicted.

S. C. 2 East, 734.

At the Old Bailey in June Session 1794, *James Reane* was indicted for a highway robbery on the 20th May 1794, and taking nineteen guineas and a shilling; and *David Watkins* was charged in the same indictment with feloniously and maliciously inciting, moving, and procuring the said *James Reane* to commit the said robbery.

The prosecutor, a gentleman of unblemished character, on Monday the 12th May 1794, was walking from *Piccadilly* about two o'clock in the day-time up *Park Lane* in his way home, when *James Reane* the prisoner, whom he had never seen before in his life, came up and asked him for some money, saying, he was in great distress; but on being refused he went away muttering expressions of anger and discontent.—On the next day nearly about the same time and place, he again accosted the prosecutor, repeated his request of money, and on being refused, exclaimed, "You shall be the worse for it," and went away. Nothing further occurred until Friday the 23d May, when the prosecutor, as he was going early in the morning from his house in *Hertford Street* to his stables in *Upper Bryanston Street*, was again

accosted by the prisoner at the corner of *Park Lane*, who with great effrontery told him that he had taken indecent liberties with him in the park, and that it had been seen and could be proved by a third person. The prosecutor, struck with astonishment, instantly turned round and with a violent exclamation asked him what he meant; to which the prisoner made no reply but walked away. On the next day Saturday 24th May, the prosecutor received a letter signed *William Gough*, directed "to *Mr. James Reane* at the Bull and Sun opposite *Poland Street* in *Oxford Street*," inclosed in a blank cover, intimating that he *Gough* had seen a gentleman in the Park arm in arm with the prosecutor, taking indecent liberties with him, exhorting him to find out his name and residence, and that he *Gough* would make him quit the kingdom, or give *Reane* a handsome settlement for life." On the receipt of this letter the prosecutor communicated the circumstances to a friend, and by his advice wrote a note on Sunday 25th May to *Reane*, desiring an interview with him in the street on the next day at or near *Grosvenor Gate*, to hear the particulars of what he had to say. On this meeting *Reane* said to him, "If you do not give me money, I now have it in my power to prove that you used indecencies with me in the park; for a third person saw it." While *Reane* was making this charge, *David Watkins* the other prisoner joined them, saying, "Yes, I saw you, it happened on Tuesday the 20th." The prosecutor exclaimed, "This is a very horrid and abominable falsity:" on which *Watkins* said, "You have great interest with government, I shall be glad of a place as a clerk, either in the customs or excise." The prosecutor said he would apply for one, on which *Watkins* went away. *Reane* then said, "You have given that man a certainty; I will have a certainty also. The prosecutor replied that he should. On the following morning *Reane* met the prosecutor by appointment near *Tyburn Turnpike*, and told him he had considered the matter, that he must have twenty pounds in cash and a bond for fifty pounds a year. The prosecutor, pursuant to a plan which he had previously concerted with his friend, told *Reane* that he could not give them to him then, but that if he

1794.

REANE'S CASE.

would wait until the Thursday following, he would bring him both the money and the bond. This promise was made under the idea that it was necessary for him to go the length of parting with his money and bond, in order to fix the crime of robbery on the prisoner. He accordingly prepared a bond, and on his next interview with *Reane*, he offered him the twenty pounds, which *Reane* refused to take; and positively insisted that he would have both the money and the bond. On which they walked together to the door of the prosecutor's house, and while *Reane* waited in the street, the prosecutor fetched the bond, and immediately put nineteen guineas and a shilling with the bond into *Reane's* hands, with both of which he went away, saying that he would give him no further trouble (*a*). In the evening however he received two letters, the one signed *James Reane*, the other *David Watkins*, threatening further proceeding unless the bond was made 100*l.* a year, and something handsome given to *Watkins* also for his life, insisting on his answer that night, and reasserting his determination. The prosecutor however had already given information of the transaction at *Bow Street*, and procured a warrant, on which the prisoners were immediately apprehended. *Reane* on his examination, after repeatedly contradicting himself, pretended that the letter signed *William Gough* had been written by a person of that name, a distiller in *Tothill Street*, who positively denied ever having written such a letter; and at length *Watkins* confessed that he was the fabricator not only of that, but of the letter signed "*James Reane.*" The prosecutor also deposed that when the prisoner first made the charge, his mind was extremely alarmed, and that he apprehended injury to his person and his character,

(*a*) But it has since been determined by THE JUDGES in the case of Jackson and Shipley, Nottingham Spring Assizes 1802, before Mr. Baron GRAHAM, that "to constitute robbery by taking money from another upon a threat to charge him with an unnatural crime, the money must be taken *immediately upon the threat made*, and not after the parties have separated, and time for the prosecutor to deliberate and procure assistance, and especially after he had consulted a friend who was even present at the time when the money was paid, though the prosecutor parted with his money from fear of losing his character. See Mr. East's Rep. Addenda xxi.

but that his fear soon subsided; and that he sought the several interviews with the prisoners for the purpose of parting with his property to them in order to fix them with the crime of robbery, and to substantiate the fact of their having extorted property from him by means of this charge; but that at the time *Reane* demanded from him the money and the bond, he parted with them to him without being under any apprehension either of violence to his person, or injury to his character; although he could not say that he parted with his property *voluntarily*.

KNAPP, *for the prisoner*, objected that to constitute robbery there must be an apprehension of danger to the person or to the character at the moment the property is parted with, but that in this case the evidence negatived these facts; and therefore the taking could not be considered as a taking by *robbery*, for the prosecutor declared that at the time he gave the prisoner the money he was under no sort of fear either for his person or his character.

GARROW replied on the part of the Crown. The Jury found the prisoner *Guilty*; but the case was reserved for the opinion of the JUDGES.

THE JUDGES in Hilary Term 1795, were of opinion that this case, under the circumstances disclosed in evidence does not amount to robbery: the prosecutor not having delivered his property to the prisoner from any apprehension of violence to his person or fear for his character; that violence is essential to robbery; that fear is constructive violence: therefore when the prosecutor swore that he did not part with his property from any apprehension of violence to his person or injury to his character, he negatived the robbery; that it was not like *Norden's Case*, for in that case there was actual violence, but that in this there was no violence either actual or constructive (*a*).

(*a*) EYRE, C. J. observed that a man might be said to take by violence, who deprived the other of the power of resistance, by whatever means he did it; that he saw no sensible distinction between a personal violence to the party himself, and the case put by one of the JUDGES of a man holding another's child over a river and threatening to throw it in unless he gave him money.

1794.

CASE CCLXXI. THE KING *against* ANN SCALBERT.

If a Juror be taken ill during the trial of a prisoner for felony, the jury may be discharged, and the remaining eleven, together with a new Juror, re-sworn to try the prisoner (*a*).

AT the Summer Assizes at *York*, in the year 1794, *Ann Scalbert* was indicted and tried before MR. JUSTICE LAWRENCE for the murder of *Mary Scalbert*.

DURING the trial, one of the Jury was seized with a fit, and was carried out of the Court in an insensible state. The Judge waited some time in hope that the Juror might recover; but at length one of the Jury who came from the same neighbourhood, requested permission of the Court to go to the public-house to which the sick man had been taken, to inquire into his situation, and he was suffered to go, accompanied by a bailiff, who was sworn to attend him. Upon his return, he was sworn "true answer to make to such questions as "should be demanded of him;" and he then deposed, that from what he had seen of his fellow Juror, and from what he knew of the state of his health, he did not think he would be able to attend that trial immediately.

MR. JUSTICE LAWRENCE thereupon, after reading from a manuscript book of MR. JUSTICE BULLER the case of *Jones*, otherwise *Horner*, where a Jury, on account of the intoxication of one of the Jurors, had been discharged, discharged this Jury, and ordered another Jury to be sworn; and all the other eleven Jurors served upon the second pannel (*b*).

THE prisoner was convicted and executed.

(*a*) S. P. in Rex *v.* Stevenson *ante*, page 456. Case 246. and Rex *v.* Edwards, Exchequer Chamber, Easter Term 1812, on a case from the Oxford Circuit, 3 Campbel's Rep. 207, and 4 Taunton's Rep. 309.

(*b*) "If," says *Sir Matthew Hale*, "after the Jury sworn and departed from the bar, one of them, *viz.* A. wilfully goes out of town, whereby only eleven remain, these eleven cannot give any verdict without the twelfth, but the twelfth shall be fined for his contempt, and *that Jury may be discharged, and a new Jury sworn; and new evidence given, and the verdict taken of the new Jury;* and thus it was done by good advice at the gaol delivery at Hartford, in August the 15th, Car. I. in the case of *Hanscomb*, the departing Juryman." 2 Hale, P. C. 295. And *Sir Thomas Raymond* says: "In the case of one *Ferrers*, against whom an information was exhibited for *forgery*, it was resolved by all the Justices, that

1794.

SCALBERT'S CASE.

although the Jury be charged and sworn in the case of a plea of the Crown, yet a Juror may be drawn, or *the Jury dismissed*, contrary to common tradition which hath been held by many learned in the law, Raym. 84. and this case is said to have exploded the opinion that did once prevail, that *a Jury once sworn and charged in any criminal case whatsoever, could not be discharged without giving a verdict*, Foster, C. L. 31. This however appears to be still the *general rule* in criminal cases, 2 Hawk. P. C. c. 47. s. 1. Rex *v.* Lord Delamere, 4 St. Tr. 232. Rex *v.* Jelf, 2 Stra. 984. And at Chelmsford Summer Assizes, 1799, *Thomas Joyce* was indicted before LORD KENYON for sheep stealing, and the Jury were charged with the indictment; but after the case had been opened by Counsel, and two witnesses examined on the part of the prosecution, one of the Jurors was suddenly seized with a fit and carried out of Court: The noble Judge *asked the prisoner whether he had any objection to another Juryman being sworn in addition to the remaining eleven*, and the evidence re-delivered to the new Jury, telling him that the indisposition of the Juror would not work his acquittal; and *the prisoner consenting*, another Juryman, whom the prisoner did not challenge, was sworn, and added to the other eleven: and the prisoner was convicted. But Mr. *Justice Foster*, who, in the case of *the Kinlocks*, examined this point very elaborately, shews upon the authority of *Sir Matthew Hale*, *Rookwood's Case*, 4 State Trials, 64. and other authorities, that it may, in certain cases, be done *without the consent of the parties*, and concludes, "Upon the whole, my opinion is, that all general rules touching the administration of justice, must be so understood as to be made consistent with the fundamental principles of justice; and consequently all cases where a strict adherence to the rule would clash with those fundamental principles, are to be considered as so many exceptions to it." And the point that if, during the trial of a prisoner for a capital offence, one of the Jurymen be taken ill, the Jury may be discharged without consent, and the prisoner tried by another Jury, was decided by THE TWELVE JUDGES, in the Case Rex *v.* Edwards from Monmouth, on 28 March, 1812. 3 Campb. Rep. 207. 4 Taunton's Rep. 311.

THE KING *against* JAMES BUNNING.

CASE CCLXXII.

An indictment for putting off counterfeit *milled money*, is supported by evidence that the prisoner put off

AT the Old Bailey in September Session 1794, *James Bunning*, otherwise *Pendergrast*, was tried before MR. JUSTICE ASHHURST, present MR. BARON HOTHAM, and MR. JUSTICE ROOKE, on an indictment which charged "That he, on the 19th July, nine pieces of false and counterfeit *milled money* counterfeit money, though such money was not *edged*. S. C. 1 East, 180.

1794. BUNNING'S CASE.

and coin, each and every of them counterfeited to the likeness and similitude of a piece of good, legal, and current milled money and silver coin of this realm called A SHILLING, and thirty-three pieces of false and counterfeit *milled money* and coin, each and every of them made and counterfeited to the likeness and similitude of a piece of good, legal and current *milled money* and silver coin of this realm called A SIXPENCE, the same several counterfeited pieces of money not being then cut in pieces, then and there unlawfully and feloniously did put off to one *Isaac Page*, at a lower rate and value than the same counterfeited pieces of *milled money* did, by their denomination, import and were counterfeited for, that is to say, for one piece of current gold coin of this realm called AN HALF GUINEA, being of the value of ten shillings and sixpence, against the form of the statute, &c."

THE fact of knowingly putting off the shillings at a lower value than according to the denomination they were of, was fully proved; but when the bad money which *Page* had received was produced in evidence, there was no *milling* nor any appearance of milling on any of the shillings or sixpences, and indeed it was proved by officers from the Mint, and admitted by the Counsel for the Crown, that this money never had been milled, nor any attempt made to counterfeit on them the milling which is always put on the shillings and sixpences coined at the Tower.

BY the statute 8 & 9 Will. 3. c. 26. s. 6. it is enacted, "That if any person or persons whatsoever shall take, receive, pay, or put off any counterfeit *milled money*, or any *milled money* whatsoever unlawfully diminished, and not cut in pieces, at or for a lower rate or value than the same by its denomination doth or shall import, or was coined or counterfeited for, that then such person or persons shall be adjudged guilty of felony."

KNOWLYS, *for the prisoner*, contended that the evidence in this case did not support the charge in the indictment; for the indictment, as it necessarily must to follow the description of the offence in the statute, alleged that the counterfeit money

was *milled*; but the evidence, instead of proving this material allegation, proved directly the contrary; namely, that the money produced, as that which had been illegally put off, was not milled.

THE Jury found the prisoner guilty; but the Court reserved the case, together with the *case of Hannah Dorrington*, tried at the same Session under circumstances precisely similar, for the consideration of the TWELVE JUDGES; and in January Session 1795, the same point occurred in the case of *Phineas Jacobs* and *Lazarus Lazarus*, which case was also reserved.

IN the February Session 1795, the four convicts were put to the bar, and MR. JUSTICE ASHHURST delivered the opinion of the TWELVE JUDGES to the following effect.—I am commissioned by the rest of the Judges to communicate their opinion on these several cases, which, though four in number, are precisely the same in their circumstances. The form in which the present indictments are drawn is that which has been invariably used in prosecutions for this offence, from the period of passing the statute to the present time. The several and component parts of this form of indictment are well and regularly connected, and pursue with precision the description of the offence in the Act of Parliament. As to the expression of "milled money," it appears most clearly from the definition of the word "coining," that it cannot have any reference whatever to the edging which is put on real and lawful coin, and which is properly termed *graining*. The process of coining, in all its circumstances, is minutely described by Mr. *Chambers* in his Dictionary of Arts and Sciences; "coining," says he, "is either performed by *the hammer* or *the mill*; the first method is not now used in Europe, especially in *England* (*a*) and *France*, though the only one known until the year 1553, when a new machine, or coining mill, was invented by an engraver, one *Antoine Brucher*, in the King's palace at *Paris*, for the coining of

(*a*) The use of hammered money is prohibited in England, by 9 Will. 3. c. 2.

1794.

BUNNING'S CASE.

counters, &c." and then he goes on describing the various parts of coining; from whence it is plain, that the operation of *milling* is a distinct and different operation from *edging*. It is *milled money* before it is *edged money*, and therefore those marks on the edges of the lawful coin are not necessary to constitute that description of coin which is called milled money. The money-coin at the Mint in the Tower is milled money before it is edged; that is, before those marks which have been falsely imagined to constitute milled money are put on it: for all the money now current is passed through a mill or press, to make the plate out of which it is cut of a proper thickness, and from this process receives its denomination of *milled money*, and not as is generally but erroneously imagined from the grainings on its edges. The description of *milled money*, both in the Act of Parliament and in the indictment, is perfectly correct; for the milling must be performed before it is edged, and, taking it as one word, is descriptive of the current money, the counterfeiting of which is the offence intended to be prevented. For these reasons the Judges are all of opinion that the indictment is properly drawn, and supported by the evidence, and that all the prisoners have been legally convicted.

THE four prisoners accordingly received judgment to be imprisoned one year in Newgate, and fined one shilling.

CASE CCLXXIII.

THE KING *against* WILLIAM HUNTER.

The name of the holder of a Navy Bill signed on a proper receipt stamp, and affixed to the Navy Bill, does not, on the face of it, *purport* to be a *receipt for money* within the statutes 2 Geo. II. c. 25. and 7 Geo. II. c. 22. but as the money is paid on such signature, and it has always been considered as *a receipt* at the Navy Office, it may, by *proper averments* in the indictment, be brought within the protection of those statutes as *a receipt for money*. S. C. 2 East, 928, 977.

AT the Old Bailey in December Session 1794, *William Hunter* was tried on the statute 2 Geo. II. c. 25. before MR. BARON PERRYN, on an indictment which stated, "That *William Hunter*, late of the parish of *St. Mary-le-strand*, in the county of *Middlesex*, labourer, on the 25th September 1794, had in his custody and possession a certain paper, partly printed and partly written, called A NAVY BILL, signed

by *Sir Andrew Snape Hammond*, Bart. *Sir John Hensloe, Knt.* and *George Marsh, Esq.* three of the principal officers and Commissioners of his Majesty's Navy, which said paper partly printed and partly written, "called A NAVY BILL," is to *the tenor* and effect following, (that is to say)

EXTRA. No. 660.

RECEIVED the 20th September, 1794, No. 1053.

1794. To *Edward Wilson*, Pilot, EXTRA in reward for his service between the 1st June and 8th Sept. 1794, in piloting his Majesty's sloop LORD MULGRAVE, from *the River Humber* to *the Downs*; thence to *Spithead*, and back to *the River Humber*, and attendance; as appears by a certificate in the Comptroller's Office, the sum of TWENTY-FIVE POUNDS. } £.25

PILOTAGE.

"*Wm. Thornton*, for Receipts, four Pence, *Wm. Hunter.*"

A. S. HAMMOND, J. HENSLOE, GEO. MARSH.

And under which said paper, partly printed and partly written, called A NAVY BILL, was then and there contained a certain order in writing for payment (called *an assignment* for payment) of the said sum of money mentioned in the said paper, partly written and partly printed, called A NAVY BILL, bearing date the 24th day of September 1794, and signed by *George Marsh, Esq. George Rogers, Esq.* and *Samuel Marshall, Esq.* three of the said principal officers and Commissioners of his Majesty's Navy, which said order in writing for payment (called *an assignment* for payment) of the said sum of money mentioned in the said paper, partly printed and partly written, called A NAVY BILL, is to *the tenor* and effect following, (that is to say)

"No. 6460, to be paid out of £2000 received 8 Sept. "1794, and applied to pay pilotage on the head of wages.

"G. MARSH, G. ROGERS, S. MARSHALL.

"ASSIGNED the 24th September 1794. O. S."

1794.

HUNTER'S CASE.

And upon which said paper, partly printed and partly written, called A NAVY BILL, was then and there contained a certain *Indorsement*, partly printed and partly written, signed by one *Thomas Davies*, Chief Clerk to the Comptroller of his Majesty's Navy, in his office for bills and accounts, which said indorsement is to *the tenor* and effect following, (that is to say)

"The certificate within mentioned is indorsed by *Edw.* "*Wilson*, payable to *Mr. Wm. Thornton.*

"T. DAVIES."

AND the Jurors, &c. further present, that the said *William Hunter*, on the said 25th September, in the 34th year aforesaid, with force and arms, at, &c. feloniously did falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, and willingly act and assist in the false making, forging, and counterfeiting *a certain receipt for money*, (TO WIT) for the sum of twenty-five pounds mentioned and contained in the said paper, partly printed and partly written, called A NAVY BILL, which said false, forged, and counterfeited *receipt for money* is as follows, (that is to say)

"WM. THORNTON,

"WM. HUNTER."

With intention to defraud our Sovereign Lord the King.—THE SECOND COUNT stated the navy bill, the order for payment, and indorsement in the same manner as in the first count, and then stated, that to the said last-mentioned paper, partly written and partly printed, called a navy bill, was annexed and written a certain false, forged, and counterfeited *receipt for money*, to wit, for the sum of twenty-five pounds in the said last mentioned paper, &c. called a navy bill, which said false, forged, and counterfeited receipt for money is as follows, that is to say, "*Wm. Thornton, Wm. Hunter*," and that he did utter and publish as true the said last-mentioned forged and counterfeited receipt for money, with intent to defraud his Majesty, he well knowing the same to be false, &c.—THE THIRD, FOURTH, FIFTH, and SIXTH Counts charged him respectively with having forged and uttered the *receipt*

1794.

HUNTER'S CASE.

with intention to defraud, 1st, his Majesty; 2d, The Right Honourable *Henry Dundas;* 3d, *William Thornton.*—SIX OTHER COUNTS, *mutatis mutandis*, charged *the receipt* to have been forged in the name of *William Thornton* only.—SIX OTHER COUNTS varied only from the preceding by calling the instrument forged *an acquittance* for money instead of *a receipt.*—And THE SIX LAST COUNTS charged such *acquittance* to have been forged and uttered in the name of *William Thornton* only.

THE facts of the case were as follow:—*Edward Wilson*, who was pilot on board his Majesty's ship "*The Lord Mulgrave*," commanded by *Capt. Rhodes*, received a certificate for his services on board that ship from *June* to *September*, 1794, which, on Tuesday the 9th September, he indorsed over to be paid to *William Thornton*, a Ship Agent and Exchange Broker. The Certificate at the time it was thus indorsed, was as follows: "To the Honourable Commissioners of his Majesty's Navy, This is to certify that *Edward Wilson* was constant pilot of his Majesty's armed sloop of war *Lord Mulgrave*, *Thomas Rhodes*, Esq. Commander, from the first day of June to the date hereof; and that the said *Edward Wilson* piloted the said sloop from the river *Humber* to *the Downs*, and from thence to *Spithead*, with convoy from thence back to the said river *Humber*, where he moored her with safety; and during that time behaved with great propriety and fidelity. GIVEN under my hand, this 23d September.

THOMAS RHODES."

IT was indorsed thus:—"Please to pay this to *Mr. William Thornton*—from your humble Servant,

EDWARD WILSON."

BUT when this certificate was produced in evidence, there appeared to have been added to it the following words: "No books for the above time,—*Rhodes.*"—"This certificate entered, P. H. 11th September, 1794."—The prisoner, *William Hunter*, was a clerk in the office of the Comptroller of the Navy, and it was his particular department in that office to take care of the pilot certificates, and make out the pilot

1794.

HUNTER'S CASE.

bills. The name of the chief clerk of this office was *Thomas Davies;* and it is in this office that NAVY BILLS are first made out. The process of making out the present Navy Bill, to which, upon the like occasions, the practice of the Navy Office invariably conforms, was as follows:—On the production of the certificate to *Thomas Davies*, he filled up THE NAVY BILL with the words "Received the 20th September, 1794," which mean that it was *registered* on that day; he then added the "No. 660," which is its number in the Registry Book, and the word "*extra*," signifying that it was granted for extraordinary services; he then ascertained the sum due; inserted the words "*Twenty-five Pounds*," in the body of the bill, and the figures "25" in the margin; and signed the initials of his name in the left hand margin, "T. D." the number $\frac{1053}{1794}$ signifying another entry which is made of it in another book, and the year in which such entry was made. It was then sent, in the usual course, to the Commissioners, and was regularly signed by the three whose names appear at the bottom of it: *Hammond*, *Hensloe*, and *Marsh*. The bill thus signed, was then carried to the office of *Oliver Standard*, the Chief Clerk and Comptroller of the Treasury, as a record, to be entered in that office, and to be *assigned* to the Treasurer of the Navy *for payment*. *Mr. Standard* accordingly subjoined *the assignment* to it; put his initials "O. S." in the margin; and sent it again to the Commissioners, three of whom, *Marsh*, *Rogers*, and *Marshall*, signed this *assignment* with the initials of their respective names, and sent it in the regular course back to the office of *Thomas Davies*, who again put his initial on the left hand, to ascertain that it was come back again to the Comptroller's Office, and had had *the assignment* set off against the entry of *the Navy Bill*. *Thomas Davies* also made on it the following *indorsement* for the information of *the Pay-Office:* "The certificate within mentioned is indorsed by *Ed. Wilson*, payable to *Mr. Wm. Thornton*. T. DAVIES."—In this state it was carried to the office of the *Clerk of the Acts*, on the 25th September, to be entered there, and delivered to the parties or their agents; but it was first entered in the Pilot Book and then in *the*

1794.

HUNTER'S CASE.

Delivering Book by *Major Woollard*, a clerk in the office, as delivered on that day to the prisoner *William Hunter*, whose official duty it was to receive the documents in this business, and to forward the completion of THE NAVY BILL through the different offices; but it did not appear whether in fact it was delivered to *the prisoner* or not, there being more *Mr. Hunters* than one: and *Major Woollard* was not certain whether the name "*Major Woollard*," written with red ink on the bill, purporting that these entries were made by him, was of his hand-writing or not. He however declared that it was a perfect NAVY BILL without this signature; that it would not be stopped at the Pay-Office for want of his name to it; and that he had known of several Navy Bills having been paid without that circumstance. On the 25th September the prisoner at the bar carried this NAVY BILL to *James Slane, Esq.* Cashier of the Pay-Office of the Navy, who, according to the custom of the Office, perceiving it to be regularly signed by the Commissioners, and certified by *Thomas Davies* as payable to *William Thornton*, and finding the names "*William Thornton*" and "*William Hunter*" signed on a fourpenny *stamp for receipt*, and wafered to the NAVY BILL; he paid the money to *William Hunter*, the prisoner at the bar, it being the constant practice of the Office when a NAVY BILL is *indorsed*, to pay it to the person who brings it. This mode of signing a Navy Bill had been always considered by the Navy Office as *a receipt* and good discharge for the money, at least during the forty years that *Mr. Slane* had held the office of Cashier, during which time the word "*receipt*" had never been made use of. Before the Stamp Act was introduced, Navy Bills were paid on the name of the persons intitled to receive them, being alone signed under the sum therein mentioned on the NAVY BILL itself; but since the stamp duty on *receipts* it had been the constant practice to pay them on their being signed in the manner in which the present bill was signed, on a separate piece of paper, properly stamped and affixed to THE NAVY BILL, either with wax, wafer, or other cement, exactly in the same place as where the name used before to be written. The Navy Bill, read in

1794.

HUNTER'S CASE.

evidence, was precisely the same as that stated in the indictment, excepting only that after the words "Assigned 24th September 1794, O.S." there were inserted the initials "T.D." and "*Major Woollard.*" But *Mr. Slane* declared that his duty did not require him to look at those signatures for his authority to pay the bill; that it was a very late practice to put the name of *Major Woollard* on Navy Bills; that he had paid many without it; and that it did not constitute any essential part of the bill. It was proved by three witnesses that the name "*William Thornton*" on the stamped receipt, was not the hand-writing of the *William Thornton* to whom *Edward Wilson* had assigned the certificate.

SHEPHERD and KNAPP, *for the prisoner*, upon the above facts being proved, submitted to the Court the several objections hereafter stated, which were replied to by FIELDING, KNOWLYS, and ALLEY, *for the Crown*; but the Jury found the prisoner guilty, and the case was saved; and in Easter Term, 1795, argued in the Exchequer Chamber on the following points (*a*):—

FIRST, that the instrument charged to be forged, does not from its *tenor*, as set out in the indictment, appear to be *a receipt for money*, within the true intent and meaning of the statute 2 Geo. II. c. 25. on which the indictment is founded.

SECONDLY. The indictment does not state that the signatures *Wm. Thornton*, *Wm. Hunter*, purport to be a receipt for money, or shew in any way their meaning or operation. If it be a receipt, it is capable of explanation, and the indictment should have so explained it as to shew that the conclusion of law is well warranted.

THIRDLY. The variance between the Navy Bill read in evidence, and the copy stated in the indictment, is fatal: for on the first are the initials of *Thomas Davies*'s name, "*T.D.*" and the whole signature of "*Major Woollard*," which are not in the copy set forth in the indictment, which professes to set forth *the tenor* of the Navy Bill, of which these signatures are essential parts.

(*a*) See the arguments stated in 2 East's P. C. 931, 932.

1794.

HUNTER'S CASE.

Mr. Justice Grose, in May Session 1796, delivered the opinion of the Judges to the following effect:—The material objection to this indictment was, that it did not contain any averment amounting to a capital offence; for although it avers that the prisoner forged a certain *receipt for money*, yet there is nothing stated in any of the counts to shew, that the instrument set out, which does not on the face of it import to be *a receipt*, is in fact a receipt, or was intended to be a receipt, or could have the operation of a receipt. In the case of *the King* v. *Mason* (1), which was relied on in arguing the present case, it is clearly laid down, that the offence must be plainly stated on the face of the indictment, that the Court may see that the charge is of that species which the law has denominated an offence; and from this position it may be concluded, that it is not enough in an indictment for forgery merely to call the paper-writing charged to have been forged *a receipt*, but it must shew that the paper-writing either *purports* to be a receipt on the face of it, or aver that it was intended to be used as a receipt by the prisoner. In an indictment for sending a threatening letter, the letter must be set out, in order that the Court may judge, from the face of the indictment, whether it is or is not a threatening letter within the meaning of the statute on which the indictment is founded. So, for the same reason, in an indictment for obtaining money under false pretences, the false pretences must be set out. So also in indictments for forging a bill, bond, note, will, or other instrument, an exact copy of the instrument respectively charged to have been forged must be stated. So in the present case, the instrument intended to have been used as a receipt must be set out; and it must appear upon the face of the instrument so set out that it is a receipt; or, supposing the words, letters, or figures, charged to have been forged, do not of themselves purport to be a receipt, there must be *an averment* of some fact, stating that the words, letters, or figures, import and signify a receipt. In the *Crown Circuit Companion* * there is a precedent of this kind. It was an indictment for altering a warrant or order of the South-Sea Company for payment of

(1) Ante, page 487. Case 224.

* Page 365.

1794.

HUNTER'S CASE.

See Rex v. Elsworth, York Lent Assizes, 1780. 2 East, P. C. 986.

an annuity, by adding the letter *y* to the word *eight*, and a *cypher* to the figures 400; by which means the word *eight* was made *eighty*, and the figures 400 were made 4000: and the indictment, in that count which is applicable to the present case, stated, "that the prisoner having in his custody a paper, partly written and partly printed, and which was then in the words, figures, cyphers, and letters following, that is to say, C. No. 1214. New South-Sea Annuities at 4 per cent. 23d. *R. R.* Esq. pay to *W. D.* &c. (setting out the warrant at large), and on the back of which said paper the aforesaid *W. D.* therein named had indorsed and signed his name as followeth, "*Wm. D.*" and *which said paper, together with the said indorsement, in the form aforesaid, did then* PURPORT *to be and was* A RECEIPT, *acquittance, and discharge, under the hand of the said W.D. for the said sum of eight pounds* (*a*), in the said paper, partly printed and partly written, mentioned, he the said *H. P.* (the prisoner) afterwards, &c. the said paper, so purporting to be such receipt, acquittance, and discharge aforesaid, feloniously did alter, and the letter *y* feloniously and falsely did make, forge, counterfeit, and add to the word eight before written in the said paper, so purporting, with the said indorsement, to be such receipt, acquittance, and

(*a*) See Rex *v.* Thompson, *post*, Old Bailey January Session 1801, for forging a certain *receipt for money*, TO WIT, for the sum of One Pound, One Shilling, and Six-pence, which said forged *receipt for money* is as followeth, that is to say, "*Settled I. M.*" but did not aver, as above stated, that these words purported to be a receipt: and on the authority of the above Case THE COURT held the indictment to be bad. (Editor's MS.) In the Case, however, of *William Testick*, who was tried at Bodmin Summer Assizes 1774, upon an indictment for publishing a forged *receipt for money* with the name *Stephen Withers*, &c. for the sum of 1*l.* 4*s.* the receipt itself was only set forth as follows, "18 March 1773 Received the contents above by me *Stephen Withers*," and it appearing in evidence that the above was forged at the bottom of a certain account, it was objected that the account itself should have been set forth; otherwise *non constat* that the receipt as stated was a receipt for money. But upon reference to all the Judges, in *Michaelmas* Term 1774, they held the indictment sufficient; for it was laid to be a forged receipt *for money*, under the hand of *Stephen Withers*, for 1*l.* 4*s.* and the bill itself was only evidence to make out that charge. 1 East's Rep. 181, *notis*. 2 East, P. C. 925.

1794.

HUNTER'S CASE.

discharge as aforesaid, whereby the words *eight pounds* before written in the said paper, so purporting, with the said indorsement, to be such receipt, acquittance, and discharge as aforesaid, with the said letter *y* so falsely made, forged, and added thereto, became *eighty pounds;* and also the cypher 0 feloniously and falsely did make, forge, counterfeit, and add to the figure and cyphers 400 before also written in the said paper, so purporting, with the indorsement aforesaid, to be such receipt, acquittance and discharge," &c. &c. Now, to apply this to the present case. The indictment charges, that the prisoner forged " a certain receipt for money, TO WIT, for the sum of twenty-five pounds, &c. that is to say, *Wm. Thornton* and *Wm. Hunter;*" but it is not enough to call the signature of these two names *a receipt*, for they do not, standing by themselves, purport to be *a receipt;* and therefore the indictment should have averred that the said names " *Wm. Thornton*," and " *Wm. Hunter*," written on the said paper, imported and signified that the said *William Thornton* and *William Hunter* had received the sum of twenty-five pounds mentioned in the said paper-writing. This is undoubtedly the law upon this subject. Therefore, as the words " *Wm. Thornton, Wm. Hunter*," do not import to be a receipt; and there being nothing to explain the import of these words, or to shew that they were in any way intended to signify that those persons had received the money, this indictment is clearly bad on the first count; and as the same objection applies in substance to the second count, though it is different in point of form (*a*), the majority of the JUDGES are of opinion that the judgment ought to be arrested.

(*a*) Buller J. thought that the second Count might be supported, considering this to be as much *a receipt* as the writing a name was *an indorsement* on a Bill of Exchange. But to this it was answered, that an indorsement was complete by writing the name on the Bill without any thing more: whereas the name itself as stated in the indictment was no receipt, though the name coupled with the Navy Bill might together form a receipt; but that it ought to be so stated as in the Case referred to in the Crown Circuit Companion, 2 East, P. C. 932.

1794.

CASE CCLXXIV.

WILLIAM THORNTON'S CASE.

The assignee of *a certificate* to A NAVY-BILL, whose name is charged to have been forged to *a receipt* for the money, is not a competent witness to prove the forgery.

ON the trial of the foregoing indictment *William Thornton*, the assignee of *Edward Wilson*'s certificate, and the person whose name was charged to have been forged on the receipt to the Navy-Bill, was produced as a witness on the part of the Crown.

SHEPHERD, *for the prisoner*, objected to his competency because if, in the event of the trial, it should appear that his name was not forged, he would be placed in a condition to be called upon for the money; and being in this way interested in the event, he could not be examined.

THE COURT allowed the objection.

CASE CCLXXV.

THE KING *against* THOMAS THOMAS.

On an indictment for *robbing the mail*, it must be proved that the *robbery* was committed in *the county* laid in the indictment.

S. C. 2 East, 605.

AT the Old Bailey in December Session 1794, *Thomas Thomas* was tried before MR. JUSTICE GROSE, on the statutes 5 Geo. III. c. 25. s. 16. and 7 Geo. III. c. 50. s. 2. on an indictment which charged, that *Thomas Thomas*, late of the parish of *St. Giles*, in the county of *Middlesex*, grocer, on the fourth day of October 1794, at the parish of *St. George's*, *Hanover-square*, in the said county of *Middlesex*, feloniously did rob a certain mail, in which letters were then and there sent by the post (TO WIT) the general post from *Bristol* to *London*, of one letter, directed, "To *Henry Thornton*, *Esquire*, London;" one other letter, directed "To Messrs. *Birch*, *Chambers*, and *Hobbs*, Bankers, London;" two other letters, one packet directed "To *Henry Thornton*, *Esq.* London;" one other packet, directed "To Messrs. *Birch*, *Chambers*, and *Hobbs*, Bankers, London;" and two other packets; against the form of the statute. THE SECOND COUNT stated, that the said *Thomas Thomas*, at the parish of *St. George's* *Hanover-square*, in the county of *Middlesex*, feloniously did steal and take from and out of a certain bag of letters, called

1794.

THOMAS'S CASE.

"the Bristol bag for *London*," then and there sent by the post (TO WIT) the general post from *Bristol* aforesaid to *London* aforesaid, one other letter, directed "To *Henry Thornton*, Esq. *London*;" one other letter, directed "To Messrs. *Birch*, *Chambers*, and *Hobbs*, Bankers, *London*;" two other letters, &c. as in the first count. THE THIRD COUNT charged him generally with having then and there stolen from and out of "the Bristol bag" a letter, directed "To *Henry Thornton*, *Esq.* London;" another letter, directed "To Messrs. *Birch*, *Chambers*, and *Hobbs*, Esquires, Bankers, in London;" two other letters, directed "To *Henry Thornton*, Esq. London;" and two other packages, against the form of the statute.

THE prisoner was a grocer, living in great reputation in the neighbourhood, in *Denmark-street*, in *St. Giles's*, in the county of *Middlesex*. On the 2d October 1794, the *Bristol* mail-coach set off from the Gloucester Coffee-house, *Piccadilly*, with the prisoner, among others, an outside passenger, sometimes riding with the coachman, and sometimes with the guard, and arrived safe at *Bristol* about twelve o'clock on the next day. About four o'clock in the afternoon of the same day, the same coach, with the mail in a sealed bag, deposited as usual in the mail-box under the seat on which the guard sat behind the coach, set off from *Bristol* on its return to *London*, with the prisoner, as before, an outside passenger. After sun-set, and a few miles after the departure of the coach from *Calne*, in *Wiltshire*, where the mail was quite safe, the guard was assisting to tie a parcel to one side of the coach; and the prisoner, who was then on the top of the coach, complaining that he was greatly fatigued, the guard permitted him to sit in his seat, and the guard sat on the top of the coach; and in this situation they continued until the coach had nearly reached *Marlborough*, when they again exchanged seats with each other. At *Marlborough* the guard was changed; and as the coach passed through the intermediate stages, the prisoner was allowed, on account of his supposed fatigue, to ride, as he had done from *Bristol* to *Marlborough*, on the guard-seat, until the coach arrived at

1794.

THOMAS'S CASE.

Colnbroke, in the county of *Middlesex*, where the mail-bag, which until its arrival at that place had been left open, was locked; and the prisoner took his seat with the coachman, on the coach-box, until they arrived at *Hyde-Park Corner*, where he got down, and went away. It was clearly proved, that the letters described in the indictment were sealed up and tied in the Bristol mail-bag, and the bag put into a sack, and deposited in the mail-box, when the coach departed from *Bristol*; that on its arriving at the Gloucester Coffee-house, the sack was put into the post-cart, and carried to the post-office; where, on opening the sack, it was discovered that the Bristol bag had been untied, the seal broken, and the bag opened. In the two letters were contained ten Bank-notes, amounting to one hundred and ninety pounds, and forty-one bills, amounting to seven hundred and twenty-two pounds one shilling and eleven-pence, most of which were traced into the possession of the prisoner on the 7th October.

It was objected on the part of the prisoner that there was no evidence of the prisoner having taken the letters out of the bag in the county of *Middlesex*; but that the proof was that they had been taken out either in the county of *Wilts* or in *Berkshire*.

To this it was answered that the offence was not complete until the prisoner had quitted the coach which was in the county of *Middlesex*, and that his having the letters in his possession in that county was in construction of law a new taking of them there.

The Jury found the prisoner *Guilty*, but that he did not take the letters out of the bag in the county of *Middlesex*, but in one of the other counties, and upon this finding, the case was reserved for the opinion of THE TWELVE JUDGES.

Mr. Justice Ashhurst, in February Session 1795, delivered the opinion of the Judges shortly as follows:—The Judges are of opinion, that the prisoner at the bar has been improperly convicted, inasmuch as the offence was stated in the indictment to have been committed in the county of *Middlesex*; and from the evidence, and *the special finding of the*

1794.

THOMAS'S CASE.

Jury, it appears to have been committed in some other county; and as all offences must be tried in the proper county where they are committed (1), the prisoner is cleared of this indictment (*a*).

(1) See 1 Hale P. C. 651, 652. 2 Hale P. C. 163. Bulwer's Case, 7 Co. 2. Gawen *v.* Hussey. Dyer Rep. 89 a.

In April Session 1795, the prisoner was indicted at common law for stealing the bills and notes, and on which indictment he was convicted in the county of *Middlesex*, and was sentenced to be transported for seven years.

(*a*) But now by 42 Geo. III. c. 81. s. 3. the offence of robbing the mail, created by 7 Geo. III. c. 50. may, if committed in *England*, be alleged and laid, prosecuted, inquired of, tried and determined, either in the county in which it shall be committed, or wherein the offender shall be apprehended.—See also 52 Geo. III. c. 143.

THE KING *against* THOMAS.

CASE CCLXXVI.

SECOND POINT.

Minutes taken by the Solicitor for a prosecution on the examination of a prisoner *before a Magistrate, and by the direction of the Magistrate*, may be read in evidence at the trial, though not signed either by the prisoner or the Magistrate.

MR. PARKYNS, Solicitor to the Post-office, being informed, on Thursday 9th October, that one of the notes taken out of the Bristol bag had appeared at THE BANK, and been traced to the prisoner, went immediately to his house; and, on his not being able to give a satisfactory account how he came by it, took him into custody, and carried him before MR. ADDINGTON, the Magistrate at *the Public Office* in *Bow-street*, where he underwent an examination. The Magistrate desired MR. PARKYNS to take down the examination; and he accordingly made minutes of what the prisoner said, exactly in the form in which examinations are regularly taken in the office. The words he wrote down were taken from Mr. *Addington's* own mouth from what the prisoner said. These minutes were then deliberately read over to the prisoner, who said, "*It is all true.*" The substance of the examination was, that he had gone to *Croydon fair* on the Thursday evening preceding, where he had staid all night without going to bed, and until the ensuing evening at eight o'clock; that he then walked to London, reached his own

1794.

THOMAS'S CASE.

home about twelve o'clock, let himself in by a key, and went immediately to bed; that on the Monday following a stranger came into his shop, and asked him if he could oblige Mr. *Wegman* with cash for a ten pound Bank-note; that he gave the man cash for it; and that the man returned soon afterwards, and got cash for other notes to the amount of a hundred pounds. On the prisoner being brought up again, after an interval of a few hours, for another examination, the Magistrate proposed to read the minutes to him again, and desired he would mention if they were incorrect in any respect, or if they required any alteration. This was done with a view to the prisoner's signing the examination, if he had chosen it. The Magistrate then began to read it; and when he had read about six lines of it, the prisoner said "that he had not been at *Croydon*, and that what had been taken down about *Croydon* was not true;" and he refused to sign the examination, saying, "that he was at *Bristol* in the mail-coach on Thursday preceding;" of which Mr. *Parkyns* made a memorandum on the back of the examination for his better recollection of the circumstance. The Magistrate, therefore, declined to read any more of the examination as the prisoner had said in the outset that it was untrue.—These minutes contained the only account that was taken *in writing* of what the prisoner had said. There was not, in any stage of the proceeding, any examination signed formally by the Magistrate, or by the prisoner: and it appeared, that the only reason alleged by the prisoner for his refusing to sign the examination was, because the part of it, as above stated, was, as he said, untrue.

KNOWLYS, *for the prisoner*, objected to the paper containing these minutes being read in evidence, because, though taken in the form of an examination, it was not *signed*; and contended that this case was extremely different from *Lambe's Case* (1), where, although the prisoner had refused to sign the examination, he had acknowledged the whole of its contents to be true.

(1) *Ante*, page 552. Case 249.

KNAPP, *for the Crown*, contended that this case was, in this respect, precisely similar to the case of *Rex* v. *Lambe*.

1794.

THOMAS'S CASE.

THE COURT. There can be no doubt but that these minutes may be read in evidence; for it is clear, that if the prisoner had spoken the contents of them to any other person than the examining Magistrate, or in any other place than the Public-office, such declaration might have been proved by the person to whom it was made; and in *Lambe's Case*, which in its circumstances was precisely like the present, the JUDGES were of opinion, that if such written examination were to be adjudged not admissible, this monstrous consequence would follow, that whatever a prisoner says when not before a Magistrate would be admissible, though depending on memory; but that, the moment a prisoner got before a Magistrate, it would not be admissible, though taken down in writing under circumstances of the greatest caution and solemnity.

THE minutes, which had been, from the time they were taken until they were produced in Court, in the custody of MR. PARKYNS, as well those which related to what the prisoner had acknowledged, as those which related to what he had denied, were accordingly read (*a*).

(*a*) At the Old Bailey in July Session 1782 *William Bradbury* was tried before MR. JUSTICE HEATH for stealing several bank post bills, bank notes, and other securities from *Mr. John Baring*. These notes had been inclosed in a letter by the proprietors of the Devonshire Bank, and directed to *Messrs. Goslings*, bankers, in London; the letter was put into the post-office at Exeter on the 29th December 1781, and sent by the mail, which arrived safe in *London* on the last day of the year. The prisoner had no employment in the post-office in *London*, but he used almost daily to go into the letter-carrier's office, to see his uncle who had for many years acted as a letter-carrier with unblemished reputation; and it appeared that he had passed several of the notes which had been so inclosed in the letter above-mentioned, at a silversmith's shop at Charing-Cross. He was apprehended on the 17th June 1782, and carried to Bow-street, where *Mr. Parkyns* attended, and took minutes of what passed on his examination, and on the trial of the prisoner these minutes were read in evidence.

1794.

CASE CCLXXVII.

A person who induces another *to deliver* Bank-notes to him by the practice of ring-dropping, on *a condition* that if he do not restore them in such a time, the entire value of the ring shall belong to the person delivering the notes, is guilty of felony; for although the *property* in the notes is parted with, the *possession* still remains with the owner.

S. C. 2 East, 680.

THE KING *against* JOHN WATSON.

AT the Old Bailey in December Session 1794, *John Watson* was tried before MR. BARON PERRYN, for feloniously stealing, on the 27th August, in the parish of *Mary-le-bone*, in *the dwelling-house* of *John Smith*, two BANK-NOTES, of the value of ten pounds each, two of twenty pounds, one of twenty-five pounds, and one of fifteen pounds, *the property* of the said *John Smith*, against the statute 12 Ann. c. 7.

MARY SMITH, the wife of the prosecutor, who lived at No. 20, *Mortimer-street*, in *Cavendish-square*, and was entrusted with the key of the cabinet in which her husband kept his Bank-notes, bills, and current cash, stated that, as she was walking along *Parliament-street*, on the morning of the day stated in the indictment, she saw a small parcel, tied up in brown paper, lying on the pavement; that while she was stooping to pick it up, the prisoner at the bar at that instant ran up, and reached it before her, crying out, as he raised it from the ground, "A prize! a prize!" that on his opening the paper, and discovering a red Morocco pocket-book, she immediately exclaimed, "Halves! halves!" that the prisoner asked her whether it was usual in *London* to give away half of a thing that was found, and being answered in the affirmative, they proceeded to *St. James's Park* where they met an elderly gentleman, with whom the prisoner appeared to be acquainted, in whose presence they opened the paper which was found to contain a locket with a large stone and a bill as follows:

"MR. ————————, London, 15 August 1794.

"Bought of *Thomas Smith*, Goldsmith and Jeweller,

"One Brilliant Diamond Locket . . . . . £. 250

"Received at the same time the contents in full.

T. SMITH."

Of this good old gentleman (*a*), as the prisoner called him,

(*a*) His name was *William Peters*; and in February 1795 he was tried and convicted of simple grand larceny.

the prisoner inquired the residence of the King's Jeweller, shewed him the rich prize they had found, and asked him how they should act. The old gentleman, after viewing the jewel for some time with great attention, exclaimed, "A rich prize indeed! I should advise you to keep it yourselves: the King's Jeweller lives the corner of *Bond-street*." At this time they had reached one of the seats in the Mall, where they all three sat down together. After some immaterial conversation had passed, the prisoner asked Mrs. *Smith* her name, and where she lived, and what family she had, and what part of her family was then at home with her. She told him that her name was *Smith*, that she was a married woman, and that her husband was abroad on business. The prisoner replied, that he was her namesake; that his name was *Thomas Smith*; that he was the Captain of a vessel lately arrived with a large cargo, which was deposited in the hands of his agent; and that he would immediately go to him, and get one hundred pounds, and give it to her as her share of the value of the prize. The prisoner accordingly deposited the pocket-book containing the jewel in the hands of the old gentleman; and, leaving the Park, returned in about a quarter of an hour, lamenting, with apparent regret, that his friend had left town for *Richmond* about an hour before, and would not return until the ensuing morning; that the prisoner asked her if she could by any means raise one hundred pounds; and on her signifying that she could, it was agreed, that on her *depositing* that sum of money with the prisoner, the old gentleman should deliver *the pocket-book* and *the locket* to her, as *a security*, and that at nine o'clock the next morning the prisoner *would bring her the hundred pounds back again*, together with one hundred and twenty-five pounds more *as her half of the value of the prize*, and take back the pocket-book and locket. To carry this agreement into execution, the parties proceeded together through the Park, and up *St. James's-street*; and when they were entering *Bond-street*, Mrs. *Smith* said, "This is *Bond-street*, and there is the King's Jeweller's:" to which the prisoner replied, "Hush! hush! never mind that now." At the top

1794.

WATSON'S CASE.

of *Bond-street* the prisoner turned to the left-hand, and conducted his two companions into a public-house, where the men drank a pot of porter, and Mrs. *Smith*, by their earnest entreaties, a glass of wine. This ceremony being performed, they proceeded to Mrs. *Smith*'s house, No. 20, *Mortimer-street*. On coming to the door, the prisoner asked her who was at home; and on her saying, "Only my daughter, nobody that will hurt you," they went in. Mrs. *Smith* shewed the gentlemen into the parlour below, desired them to sit down, gave her daughter the key of the cabinet above stairs; and, telling her the good fortune she had met with, desired her to look out one hundred pounds in Bank-notes. During this interval the old gentleman produced the pocket-book containing the supposed jewel; and the prisoner inquired of Mrs. *Smith*, whether she could not put it into some place of safety until the next morning; and she accordingly brought forward the tea-chest for that purpose. The daughter soon afterwards brought down six Bank-notes, amounting to one hundred pounds, and laid them on the table, which the prisoner immediately took up, and with the full consent of Mrs. *Smith* put them into his pocket, saying that he would call the next morning and settle the whole. The prisoner then received from her the key of the tea-chest, which he opened, and deposited in it the pocket-book and trinket; and locking it, returned her the key, desiring that it might not be opened until he returned the next morning to settle the business. On the departure of the prisoner and his associate, the curiosity of Mrs. *Smith*'s daughter, who had frequently heard of but had never seen a diamond, induced her mother to open the casket. While they were admiring the richness of the jewel, Mrs. *Smith*'s son, who was a glazier, came in; and trying one of the stones with his cutter, found it to be quite soft; and on taking it to a Jeweller, it appeared to be a mere composition, only worth five shillings and sixpence: Mrs. *Smith* on her oath declared that she did not permit the prisoner to take the notes as and for *a purchase* of the trinket, but merely as *a deposit* for the security of it. But the prisoner never returned.

1794.

WATSON'S CASE.

KNOWLYS, *for the prisoner*, contended, that as Mrs. *Smith* had freely and voluntarily parted with these Bank-notes to the prisoner on a condition to restore the trinket to him the ensuing morning, the non-performance of his part of this contract rendered him liable to a civil action, but could not involve him in the guilt of felony. The money had not been taken from her possession against her will, which is an essential ingredient in the crime of larceny; but she had parted with the possession with her own consent, by delivering the notes to him; and it is immaterial whether they were so delivered as *a deposit*, or as *a purchase*. He also contended, on the authority of the cases of *Rex* v. *Campbell*, at the Old Bailey in January Session 1792 (1), and *Rex* v. *Owen*, in the same Court in July Session following (2), that the prisoner was entitled to an acquittal of the capital part of the charge; for that, supposing this to be a felonious taking, it was a taking from *the person* of the prosecutrix, and therefore not a stealing in the dwelling-house.

(1) *Ante*, page 564. Case 258.

(2) *Ante*, page 572. Case 256.

THE COURT accordingly directed the Jury to acquit the prisoner of the capital part of the charge (*a*); but left it with them to consider, whether the prisoner had not an original preconcerted design to obtain this property by means of a fraudulent trick.

THE JURY found the prisoner guilty of the simple grand larceny, and acquitted him of stealing in the dwelling-house: but the case was reserved for the opinion of the JUDGES.

MR. JUSTICE ASHHURST in February Session 1795, delivered the opinion of the JUDGES to the following effect:— The prisoner at the bar having been acquitted of the charge of stealing these Bank-notes in *the dwelling-house*, and found guilty of the simple larceny, the only question raised at the time was, whether his offence, under all the circumstances of the case, amounted to felony, or was only a fraud. It is

(*a*) This direction was approved of by the TWELVE JUDGES, for they thought that as the notes were in the possession of the prosecutrix and derived no protection from the house, the case did not fall within the statute 12 Ann. c. 7. S. C. 2 East, 682.

1794.

WATSON'S CASE.

See Rex *v.* Moore, *ante*, page 314. Case 152.

clear that the proprietor of these Bank-notes never parted with them except on a particular condition; namely, that the notes should be restored to her together with one hundred and twenty-five pounds, the ensuing morning, which condition the prisoner never performed. It is clear that the promise to return the notes was a mere pretence, and part of the contrivance by which the prisoner practised upon the credulity of Mrs. *Smith*; he had no real intention to return the property, but meant from the very beginning of the transaction to purloin it, and convert it to his own use; and it is now settled, that persons who acquire the property of another by such practices as the prisoner made use of, are guilty of felony, and not merely of fraud.

THE prisoner was accordingly sentenced to transportation for seven years.

CASE CCLXXVIII.

THE KING *against* JOHN FRANKS.

An indictment on the 15 Geo. II. c. 28. for uttering bad money by the common trick called *ringing the changes*, is good, although it do not state that *it was uttered in payment as, and for, good money*, for the words of the statute are in the disjunctive "utter," or "tender in payment."

AT the Old Bailey December Session 1794, *John Franks* was tried on the statutes 15 Geo. II. c. 28. which enacts, "That if any person whatsoever shall *utter*, OR *tender in payment*, any false or counterfeit money, knowing the same to be false or counterfeit, to any person or persons, and shall be thereof convicted, such person so offending shall suffer six months' imprisonment, and find sureties for his or her good behaviour for six months more, &c. And if the same person shall afterwards be convicted a second time of the like offence of *uttering* OR *tendering in payment*, any false or counterfeit money, knowing the same to be so, such person shall for such second offence suffer two years' imprisonment. And if the same person shall afterwards offend a third time in *uttering* OR *tendering in payment*, any false or counterfeit money, knowing the same to be so, he or she shall be guilty of felony without benefit of clergy." AND IT IS FURTHER ENACTED, That if any person whatsoever shall *utter*, OR *tender in payment*, any false or counterfeit money, knowing the same to be false or counterfeit, to any person or persons,

1794.

FRANKS'S CASE.

and shall, either the same day, or within the space of ten days then next, *utter*, OR *tender in payment*, any more or other false and counterfeit money, knowing the same to be false or counterfeit, to the same person or persons, or to any other person or persons, or shall, at the time of such *uttering* OR *tendering*, have about him or her, in his or her custody, one or more piece or pieces of counterfeit money, besides what was so uttered or tendered, then such person so *uttering* OR *tendering* the same, shall be deemed and taken to be a common utterer of false money, and being thereof convicted shall suffer a year's imprisonment, and shall find sureties for his or her good behaviour for two years more. And if any person having been once so convicted as a common utterer of false money, shall afterwards again *utter*, OR *tender in payment*, any false or counterfeit money, to any person or persons, knowing the same to be false or counterfeit, then such person shall for such second offence be guilty of felony without benefit of clergy."

THE INDICTMENT stated, "That *John Franks* one piece of false and counterfeit money, made and counterfeited to the likeness and similitude of a piece of good, lawful, and current money and silver coin of this realm, called a shilling, then and there unlawfully, unjustly, and deceitfully, did utter to one *James Redit*, he the said *John Franks*, at the time when he so uttered the said piece of false and counterfeit money, then and there well knowing the same to be false and counterfeit, in contempt, &c."—There was a second count, for uttering another false and counterfeit shilling within ten days.—

ON Sunday, 27th July, the prosecutor, Mr. *Redit*, having bargained with the prisoner, a Jew, who was selling fruit about the streets, to have five apricots for sixpence, gave him *a good shilling* to change. The Jew put the shilling into his mouth as if to bite it in order to try its goodness, and returning a shilling to the prosecutor told him it was a bad one. *Mr. Redit* gave him another *good shilling*, which he also affected to bite, and then returned another shilling saying it

1794.

FRANKS'S CASE.

was not a good one. *Mr. Redit* gave him another *good shilling*, with which he practised this trick a third time. The shillings returned by the Jew were all *bad shillings*, and these circumstances, together with several others of a suspicious nature, but which are not necessary to be enumerated, induced the prosecutor to apprehend him as a common utterer of *bad money*, and he was found Guilty of the charge in the indictment upon very clear and satisfactory evidence.

KNAPP, *for the prisoner*, submitted to the Court, that the statute on which this indictment was drawn did not comprehend the present case; that the Legislature could not have this practice in contemplation at the time, and therefore could only mean to punish an utterer of bad money when such uttering was, as the statute expressed it, *in payment*; and that of course the indictment ought to have stated, that it was "uttered in payment as, and for, a piece of good, lawful, "and current money of this realm, called *a shilling*."

THE COURT.—The prisoner, in the present case, as appears most clearly from the evidence, did not utter these shillings as, and for, good money, but as bad money. The utterer keeps a number of bad shillings in his hand or mouth and on receiving a good shilling from a customer, he changes it for a bad one, and then returns it as the identical shilling he received. It is a common trick that has been long practised by utterers, and is called "*Ringing the Changes.*" If, therefore, the indictment had stated the uttering to have been "in payment as, and for, a piece of good money," the evidence would have rebutted the charge. But there can be no doubt but that the words of the statute are sufficient to include this case. It is throughout expressed in the disjunctive, "utter, *or* tender in payment," and thereby renders the *uttering* and *tendering in payment* two distinct and independent acts; and, therefore, the indictment is right.

1794.

CASE CCLXXIX.

THE KING *against* BENJAMIN LARA.

An indictment for a fraud at common law, charging the *false pretence* to have been made to one person and *the deceit* to have been practised on a different person, is bad. S. C. 6 Term Rep. 565. 2 East, 819, 824.

AT the Old Bailey December Session 1794, *Benjamin Lara* was indicted for a fraud; but the indictment was moved by *certiorari* on the part of the prosecution to the Court of King's Bench in Easter Term 1794, and the defendant having pleaded *Not Guilty*, it was tried at Guildhall on Tuesday 2d June 1794.

THE indictment consisted of two counts.

THE FIRST COUNT stated, "That on 30th day of September, in the 34th year, &c. at *London*, (that is to say) at the parish of *Saint Bartholomew by the Exchange*, in the ward of *Broad-street*, in *London* aforesaid, one *John Spicer* had in his custody and possession certain receipts of the Cashiers of the Governor and Company of THE BANK OF ENGLAND, for the deposit of one pound ten shillings and four pence, and the second, third, and fourth payments of two pounds each, amounting together to the sum of seven pounds ten shillings and four pence, which had been advanced and paid unto the said Cashiers by way of contribution for, and in respect of, each and every of two hundred and fifty tickets in the Lottery, to be drawn by virtue and in pursuance of an Act passed in the 34th year, &c. entitled, &c. the said receipts then and there being the property of, and belonging to, one *Benjamin Mendes da Costa* and of large value, (to wit) the value of 2157*l.* 10*s.* of the lawful money of Great Britain, &c. AND THE JURORS, &c. do farther present, that *Benjamin Lara*, late of *London*, surgeon, well knowing the premises, and being a person of a wicked and dishonest mind and disposition, and contriving, and unlawfully and deceitfully intending, by divers crafty means and subtle devices, to obtain, acquire, and get into his hands and possession the said receipts, for, and in respect of, the said several Lottery tickets, and to cheat and defraud the said *Benjamin Mendes da Costa*, of the said sum of 2157*l.* 10*s.* the aforesaid value thereof, on the said 30th September, in the 34th year aforesaid, with force

1794. LARA'S CASE.

and arms at *London* aforesaid, (that is to say) at the parish, &c. unlawfully, falsely, fraudulently, and deceitfully, *did pretend to the said Benjamin Mendes da Costa*, that he the said *Benjamin Lara* then wanted to purchase Lottery tickets, (meaning that he the said *Benjamin Lara* then wanted and had occasion to purchase tickets in the said Lottery), and that he the said *Benjamin Lara* would purchase the aforesaid receipts for, and in respect of, the said several Lottery tickets, for a valuable consideration, (to wit) at and after the rate of 19*l.* 14*s.* 6*d.* for each of the said tickets. AND THE JURORS, &c. do further present, that the said *Benjamin Lara* afterwards, (to wit) on the said 30th September, &c. unlawfully, falsely, fraudulently, and deceitfully, *did pretend to the said John Spicer*, that he the said *Benjamin Lara* was ready immediately, (meaning that he the said *Benjamin Lara* was then and there ready and provided with sufficient money to pay the said sum of 2157*l.* 10*s.* for the aforesaid receipts, for, and in respect of, the said several Lottery tickets). AND THE JURORS, &c. do further present, that the said *Benjamin Lara* afterwards, to wit, on the said 30th September, &c. unlawfully, fraudulently, and deceitfully, did produce and deliver to the said *John Spicer*, a certain false, feigned, and fictitious order for payment of money, with the name of him the said *Benjamin Lara* thereto subscribed, purporting to bear date *London*, 30th day of September, in the 34th year aforesaid, and to be directed to *Robert Ladbroke*, Esquire, *Sir Walter Rawlinson*, Knight, *Felix Ladbroke*, Esquire, *John Parker*, Esquire, and *Thomas Watson*, Esquire, of *London*, bankers and partners, by the description of *Messrs. Ladbroke and Co.* for the payment of 2157*l.* 10*s.* to the said *John Spicer*, by the description of *Mr. J. Spicer*, or bearer; THE TENOR of which said false, feigned, and fictitious order for payment of money is as followeth, (that is to say),

"LONDON, 30th September 1794.

"MESSRS. LADBROKE and Co.

"PAY *Mr. J. Spicer*, or bearer, two thousand one hun-
"dred and fifty-seven pounds 10*s.*

"£2157 10*s.* "BEN. LARA."

AND THE JURORS, &c. do further present, that the said *Benjamin Lara*, afterwards, &c. unlawfully, falsely, fraudulently, and deceitfully, *did pretend to the said John Spicer*, that the said false, feigned, and fictitious order for payment of money, was a good and sufficient order for payment of the sum of 2157*l.* 10*s.* therein mentioned; AND THAT he the said *Benjamin Lara* then had money in the hands and custody of the said *Robert Ladbroke*, *Sir Walter Rawlinson*, *Felix Ladbroke*, *John Parker*, and *Thomas Watson*, sufficient to pay the said sum of 2157*l.* 10*s.* mentioned in the said order; AND THAT the said *Robert Ladbroke*, *Sir Walter Rawlinson*, *Felix Ladbroke*, *John Parker*, and *Thomas Watson*, would pay the said sum of 2157*l.* 10*s.* on the said order being presented to them for payment. BY MEANS OF WHICH said false, feigned, and fictitious order, he the said *Benjamin Lara*, afterwards, &c. unlawfully, falsely, fraudulently, and deceitfully, did obtain, acquire, and get into his hands and possession, of and from the said *John Spicer*, the aforesaid receipts, for, and in respect of, the said several Lottery tickets, the same receipts then and there being of large value, (to wit), the value of 2157*l.* 10*s.* and the property of the said *Benjamin Mendes da Costa*. WHEREAS IN TRUTH, AND IN FACT, &c. &c. &c. And so the Jurors aforesaid, upon their oath aforesaid, do say, that the said *Benjamin Lara*, on the said 30th September, in the 34th year, &c. by the false pretences and deceitful colours, and in manner, and by the means aforesaid, unlawfully, fraudulently, and deceitfully, did deceive the said *John Spicer*, and cheat and defraud the said *Benjamin Mendes da Costa*, of the said receipts, for, and in respect of, the said Lottery tickets, the same receipts being then and there of large value, &c. to the great deception of the said *Benjamin Mendes da Costa* and *John Spicer*; to the great damage of the said *Benjamin Mendes da Costa*, in contempt of our said Lord the King, and his laws, &c. &c."

THE EVIDENCE.—The defendant, *Benjamin Lara*, about eleven o'clock in the morning of the 30th September 1794, went into the ticket market at THE STOCK EXCHANGE, and

1794.

LARA'S CASE.

inquired the price of Lottery tickets. Among other dealers in this article he accosted one *Benjamin Mendes da Costa*, and asked him if he had any English tickets. *Da Costa* replied, "Yes; what is it you wish to do?" *Lara* answered, "To "buy." *Da Costa* continued, "How many, and for when?" *Lara* said, "One hundred for now." *Da Costa* then inquired in the market what the price of the day was, and told *Lara* he should have 100 at 19*l.* 14*s.* 6*d.* which number *Lara* agreed to take at the price mentioned, and then went away. Soon afterwards *Da Costa* meeting *Lara*, again told him he might have another 100 tickets at the same price, which *Lara* also agreed to take. During this interview, one *Thomas Saunders*, another dealer in tickets, came up to them and asked *Lara* if he had completed his quantity; to which *Lara* replied, "No; I shall want another 100;" and, after some conversation, it was agreed that *Da Costa* should furnish him with the whole number. About two o'clock on the same day, *Lara* asked *Da Costa* if he was ready to deliver the 300 tickets, to which *Da Costa* replied, that he was not yet quite ready, and asked *Lara* if he was inclined to lend money on the security of tickets. *Lara* told him that he was not, for that he had been selling out stock in order to pay for those he had bought, and had scarcely sufficient for that purpose. This, however, was not true, for *Lara* had not sold out any stock, nor had he any to sell. About half an hour after this conversation, one *John Spicer*, another dealer in tickets, came to *Lara* in THE STOCK EXCHANGE, and telling him that he had 200 tickets to deliver to him on account of *Da Costa*, asked him if he was ready to take them. *Lara* replied, "Yes; but you must not take my draft immediately into the banker, as the whole money is not yet there." *Spicer* answered, "No; I will not. Give me your draft, and it shall go through my banker's." During this conversation, *Da Costa* came up and said, "*Spicer*, you may as well give *Lara* fifty tickets more, and then he will pay you for 250; and I will deliver him the remaining 50." Upon which *Spicer* said, "Come, *Lara*, give me your draft for them now." *Spicer* then made out the account of 250 tickets, at 19*l.* 14*s.* 6*d.* and

Lara, on receiving the receipts for the tickets, gave to *Spicer* his draft for the amount, on *Messrs. Ladbroke and Co.* bankers, in whose hands he was so far from having any cash, that he had not even opened an account with them. At the same time that he gave *Spicer* this draft, he gave *Da Costa* a similar draft on receiving from him the remaining 50 receipts, desiring that he would not present it immediately for payment, as he had not sufficient cash then there; to which *Da Costa* said, "Very well." It was clearly proved that the 250 receipts were the absolute property of *Spicer*, and the remaining 50 the property of *Da Costa*. *Lara* having thus obtained possession of the 300 tickets, carried them immediately to one *Edward West*, with whom he pawned them for 2550*l.* which he was to repay, with 5 per cent. for the time, on 30th October following, and received two drafts to that amount, drawn by *West* on *Messrs. Hankeys*, his bankers. These drafts *Lara* immediately received at *Hankeys* in one 500*l.* and two 1000*l.* bank-notes, with which he went directly to THE BANK OF ENGLAND; changed them for smaller notes; went home; ordered a post-chaise; and set off, with all possible expedition, towards *Romford* in *Essex*. A young man of the name of *Cleland*, whom he met with on the road, told him that the Royal Exchange was in an uproar respecting the draft he had given to *Spicer* not being paid, and his not ever having had any cash at that banking-house. *Lara* affected great surprise at the information, seemed to wonder how the mistake could have happened, and said he would rectify it on his return to town; but on *Cleland* saying, rather peremptorily, that the business must be settled immediately, they returned together to *London*, and *Lara* desired *Cleland* would accompany him to his house, where *Lara* left *Cleland* waiting in a front-room while he decamped through the back-door, and absconded a second time with the money. Hand-bills were immediately circulated throughout the kingdom, offering a large reward for the apprehending of him, and he was traced by the Police Officers, from stage to stage, to *Portsmouth*, and from thence back again to *London*, where, in consequence of a letter which had been found on his brother, in

1794.

LARA'S CASE.

which he had given an account of the manner by which he had at length effected this fraud, which it seems he had long meditated, he was apprehended at *the Golden Cross* at *Charing-cross*, and the whole money, excepting about sixty pounds, found upon him.

SHEPHERD and KNAPP, *for the defendant*, contended,

FIRST, That THE FIRST COUNT in the indictment was not sustained by the evidence; for it alleged the tickets to be the property of *Da Costa*, but the evidence proved they belonged to *Spicer*, who swore that he bought them of *Margary and Co.*

SECONDLY, That this count was upon the face of it bad, for that it charged *Lara* with having made the false pretences to *John Spicer*, by means of which he deceived the said *John Spicer*, and did cheat and defraud the said *Benjamin Mendes Da Costa*; which is making the false pretence that was used to one man, and by which he was deceived, operate to the prejudice of another.

THE Jury accordingly acquitted the defendant on the first count, and found him Guilty on the second; but motion was made, as follows, to arrest the judgment.

A person who under a mere *false pretence* of purchasing lottery tickets, bargains with the holder of them, and obtains the delivery of them by giving a draft on a banker, with whom he had no cash, for the amount of them, is not indictable for a fraud at common law; for in order to constitute this offence, the property must be obtained either by *conspiracy*, or by means of a *false token*, as well as a *false pretence*, and not as in this case, by a mere *false assertion*, or bare *naked lie*. S. C. 2 East, 819, 827.

THE SECOND COUNT charged "That the said *John Spicer* was possessed of certain receipts of the Cashiers of the Governor and Company of THE BANK OF ENGLAND of the deposit of 1*l.* 10*s.* 4*d.* and the 2d, 3d, and 4th payments of 2*l.* each, amounting together to the sum of 7*l.* 10*s.* 4*d.* which had been advanced and paid unto the said Cashiers by way of contribution for, and in respect of, each and every of 250 tickets in the Lottery, to be drawn by virtue and in pursuance of an Act passed in the said 34th year, &c. intitled, &c. the said receipts then and there being of large value, to wit, of the value of 2157*l.* 10*s.* &c. AND THAT the said *Benjamin Lara*, well knowing the premises last aforesaid, and being a person of a wicked and dishonest mind and disposition, and contriving, and unlawfully and deceitfully intending, by di-

vers crafty means and subtle devices, to attain, acquire, and get into his hands and possession the said receipts for and in respect of the said several Lottery-tickets, and to cheat and defraud the said *John Spicer* of the said sum of 2157*l.* 10*s.* the aforesaid value thereof, on the, &c. unlawfully, falsely, fraudulently and deceitfully did pretend to the said *John Spicer*, that he the said *Benjamin Lara* was minded to purchase, and would purchase, the aforesaid receipts, for and in respect of the said several Lottery-tickets, for a valuable consideration, TO WIT, the price or sum of 2157*l.* 10*s.* and that he the said *Benjamin Lara* was ready immediately (meaning that he the said *Benjamin Lara* was then and there ready and provided with sufficient money to pay the said sum of 2157*l.* 10*s.* for the aforesaid receipts,) &c. AND THAT the said *Benjamin Lara*, afterwards, TO WIT, &c. unlawfully, fraudulently and deceitfully delivered to the said *John Spicer* a certain false, feigned and fictitious order for payment of money, with the name of him the said *Benjamin Lara* thereto subscribed, *purporting*, &c. THE TENOR of which said false, feigned and fictitious order for payment of money is as followeth; that is to say,

"LONDON, *Sept.* 30, 1794.

"MESSRS. LADBROKE & Co.

"PAY to Mr. *J. Spicer* or bearer, two thousand one hun-
"dred and fifty-seven pounds 10*s.*

"£.2157. 10. "BEN. LARA."

AND THAT the said *Benjamin Lara* afterwards, TO WIT, &c. unlawfully, falsely, fraudulently and deceitfully did pretend to the said *John Spicer*, that the said false, feigned and fictitious order for payment of money was a good and sufficient order for payment of the sum of 2157*l.* 10*s.* therein mentioned; and that he the said *Benjamin Lara* then had money in the hands and custody of the said *Robert Ladbroke*, *Sir Walter Rawlinson*, *Felix Ladbroke*, *John Parker*, and *Thomas Watson*, sufficient to pay the said sum of 2157*l.* 10*s.* on the said order being presented to them for payment. BY MEANS OF WHICH said false colours and pretences last mentioned, he the said *Benjamin Lara* afterwards, TO WIT, &c. unlawfully, falsely, fraudulently and deceitfully did obtain,

1794. LARA'S CASE.

acquire and get into his hands and possession, of and from the said *John Spicer*, the aforesaid receipts, for and in respect of the said several Lottery-tickets, the same receipts then and there being of large value, to wit, of the value of 2157*l.* 10*s.* WHEREAS IN TRUTH AND IN FACT, &c. the said *Benjamin Lara* was not minded, nor did he intend, to purchase the said receipts for and in respect of the said several Lottery-tickets, for a valuable consideration, TO WIT, for the price or sum of 2157*l.* 10*s.* AND WHEREAS, &c. he was not minded, nor did he intend to purchase the said receipts, &c. for any valuable consideration whatsoever. AND WHEREAS, &c. he was not ready and provided with sufficient money for the said sum of 2157*l.* 10*s.* for the aforesaid receipts, &c. AND WHEREAS, &c. at the time when he did produce and deliver the aforesaid false, feigned and fictitious order for payment of money to him the said *John Spicer* as aforesaid, he the said *Benjamin Lara* knew that the same order was false, feigned and fictitious, and not a good and sufficient order for the payment of the said sum of 2157*l.* 10*s.* therein mentioned. AND WHEREAS the said order for payment of money was false, feigned and fictitious, and not a good and sufficient order for the payment of the sum of 2157*l.* 10*s.* and he the said *Benjamin Lara* well knew the same. AND WHEREAS, &c. he had not money in the hands and custody of the said *Robert Ladbroke*, &c. sufficient to pay the said sum of 2157*l.* 10*s.* mentioned in the said order. AND WHEREAS, &c. he had not any money whatsoever in the hands and custody of the said *Robert Ladbroke*, &c. AND WHEREAS, &c. he well knew that he had not then any money in the hands and custody of the said *Robert Ladbroke*, &c. AND WHEREAS he, at the time of producing and delivering the said false, feigned and fictitious order for payment of money to the said *John Spicer* as aforesaid, well knew that the said *Robert Ladbroke*, &c. would not pay the said sum of 2157*l.* 10*s.* mentioned in the said order, on the said order being presented to them for payment, TO WIT, &c. AND THAT the said *BenjaminLara*, on the said, &c. by the false pretences and deceitful colours, and in the manner and by the means last aforesaid, unlawfully, fraudulently and deceitfully did deceive, cheat and defraud the said *John Spicer*

of the said receipts for and in respect of the said several Lottery-tickets, the said receipts then and there being of large value, to wit, of the value of 2157*l.* 10*s.* to the great damage and deception of the said *John Spicer*, in contempt of our said Lord the King and his laws, to the evil example, &c. and against the peace, &c."

SHEPHERD, *for the prisoner*, in Trinity Term 1796, obtained a rule to shew cause why the judgment on this count should not be arrested, because, FIRST, The indictment being for a fraud at *common law*, it ought to have charged that the defendant had used some *extrinsic token* against which common prudence would not have been sufficient to guard, and not his *bare assertion* only, for the purpose of effectuating the fraud. SECONDLY, This transaction was a transaction merely of a *private nature*, upon a subject that only concerned the parties themselves, and not a matter of *public concern*, as it must be, for the purpose of supporting an indictment for a fraud at common law.

ERSKINE, GARROW, WOOD, and KNOWLYS, on shewing cause, said that the indictment had been framed for a fraud at common law, because the statutes 33 Hen. VIII. c. 1. and 30 Geo. II. c. 24. only applied to such persons as shall by *false tokens* or *false pretences* obtain *money* or *goods*; and that by analogy to other cases it was apprehended *Lottery-tickets* might not be within either of these descriptions. They admitted that, according to the case of *Rex* v. *Wheatly*, that a fraud upon an individual must, to be indictable, be effected either by *conspiracy*, or by a *false token*, as well as *a false pretence*, of such a nature as common prudence could not guard against: and they contended that the *false pretence* in the present case was, that he wanted to purchase Lottery-tickets; and the *false token*, the *draft* upon the bankers, which he gave for the purpose, and as the means of getting possession of them. This draft imported on the face of it, that *Lara* had a right to draw on *Ladbroke and Co.* and therefore it amounted to something more than a bare promise to pay; for he could not have obtained possession of the tickets on such a promise alone. This is not like the case of a person over-drawing his banker; for here *Lara* had no

1794.

LARA'S CASE.

right to expect credit for the sum he drew for; and they cited *Rex* v. *Lockett* (1), *Rex* v. *Serlested* (2), *Rex* v. *M'Carty* (3), *Rex* v. *Govers* (4), and *Rex* v. *Munoz* (5). As to THE SECOND POINT, they contended that as a large share of the money transactions of the commercial world was carried on by means of the credit given to drafts upon bankers, a fraud which tended to impeach such a security must be taken as an offence of a public nature.

(1) *Ante*, page 94. Case 53.
(2) Latch, p. 201.
(3) Ld. Ray. p. 1179.
(4) Sayer, p. 206.
(5) 2 Stra. p. 1127.

LORD KENYON, *Chief Justice*. The true boundary between the frauds which are and those which are not indictable at common law, is clearly settled in the case of *Rex* v. *Wheatley* (6). It is there said that there must be either a *false token* or a *conspiracy*; for *a false affirmation* alone is not sufficient, as in the case there mentioned, where a person falsely affirmed, on selling a sack of corn, that it contained a *Winchester bushel*. In the present case the defendant used no *false token*, but obtained the credit solely on his own *false assertion*. He sat down indeed, and drew *a draft* upon a banker; but the drawing of this draft left his credit exactly as it was before (*a*), and therefore it cannot be called a *false token*. The defendant's conduct was certainly grossly immoral; but as he used no *false token* to accomplish his deceit, the judgment must be arrested.

(6) 2 Burr. p. 1125. 1 Black. p. 273

GROSE, *Justice*. HAWKINS, speaking of CHEATS, says, "it is an indictable offence to defraud another of his known right by means of some *artful device*; but that the deceitful receiving of money from one man to another's use upon a *false pretence* of having a message and order to that purpose, is not punishable by a criminal prosecution, because it is accompanied with no manner of *artful contrivance*, but wholly depends on a bare *naked lie*." To make the assertion of the

Hawk. P. C. Bk. 1. ch. 71. sect. 2.

(*a*) But see the Case of Rex *v.* Jackson, before Mr. JUSTICE BAYLEY, Spring Assizes Glocester 1813, on an indictment on 30 Geo. II. c. 24. where it appeared that the prisoner had obtained property by giving a draft on his banker and pretending he had cash there to pay it, and the JUDGE said, that his point had been recently before the JUDGES, and that they were all of opinion that it is an indictable offence fraudulently to obtain goods by giving in payment a cheque upon a banker with whom the party keeps no cash, and which he knows will not be paid. 3 Campbell's Reports, 370, and *post*.

1794.

LARA'S CASE.

defendant in the present case something more than a bare naked lie, it is said that the draft on his banker was a *false token*; but if this were to be determined an indictable offence, I do not know how to draw the line; for it might equally be said that every person who over-drew his banker used a *false token*, and might be indicted for it.

LAWRENCE, *Justice*. It is admitted that a mere *false assertion*, unaccompanied by a *recommendation*, is not indictable; and there is certainly nothing in this case beyond the defendant's own *false assertion*. In *Nehuff's Case* (1), where a person borrowed 600*l*. of a married woman, and promised to send her fine cloth and gold-dust as a pledge, and sent no gold-dust, but some coarse cloth, worth little or nothing, the Court said it was not a matter criminal, but it was the woman's fault to repose such a confidence in another person.

(1) Salk. 151.

THE judgment was arrested.

1795.

CASE CCLXXX.

THE KING *against* ANSELMO ROBINSON GILCHRIST.

An indictment for forging a bill of exchange directed to *Ransom, Moreland*, and *Hammersley*, stating that it PURPORTED to be directed to *George* Lord *Kinnaird, William Moreland* and *Thomas Hammersley*, by the names and description of *Ransom, Moreland* and *Hammersley*, is bad; for the *purport* and *tenor* are repugnant. S. C. 2 East, 982.

AT the Old Bailey in February Session 1795, *Anselmo Robinson Gilchrist* was tried before MR. JUSTICE BULLER for forgery.

THE indictment stated "That *Anselmo Robinson Gilchrist*, late of the parish of *Saint Martin in the Fields*, in the county of *Middlesex*, labourer, on the twelfth day of September, in the thirty-fourth year, &c. &c. did falsely make, forge and counterfeit, and cause and procure to be falsely made, forged and counterfeited, and willingly act and assist in the false making, forging and counterfeiting a certain paper writing, PURPORTING to be an order for payment of money, dated the eleventh day of September 1794, with the name of *Thomas Exon*, clerk, thereunto subscribed, purporting to have been signed by *Thomas Exon*, clerk, and to be directed to *George* Lord *Kinnaird*, *William Moreland*, and *Thomas Hammersley*, of the parish of *Saint James* within the liberty of *Westminster*, in the county of *Middlesex*, bankers and

1795.

GILCHRIST'S CASE.

partners, by the names and description of Messrs. *Ransom, Moreland* and *Hammersley*, for the payment of the sum of TEN POUNDS, to Mr. *Brookes* or bearer; THE TENOR of which said false, forged and counterfeited paper writing, PURPORTING to be an order for payment of money, is as followeth: (that is to say) " Messrs. RANSOM, MORELAND and HAMMERSLEY, PLEASE to pay to Mr. *Brookes* or bearer the sum of Ten Pounds, for Your humble servant, THOMAS EXON. September 11, 1794." with intention to defraud the said *George* Lord *Kinnaird*, *William Moreland*, and *Thomas Hammersley*, against the form of the statute, &c." There was a SECOND count for knowingly uttering and publishing the said order with the like intention; a THIRD and FOURTH count for forging and uttering it with intention to defraud *Charles Lewis*; and a FIFTH and SIXTH count, for forging and uttering it with intention to defraud *Thomas Exon*.

THE prisoner, in the beginning of the month of *September*, called at the shop of Mr. *Lewis*, a breeches-maker at *Charing-cross*, and ordered certain articles of wearing apparel to be made for him; which order was regularly executed, and came to six pounds four shillings, for the payment of which the prisoner on the 12th September gave Mr. *Lewis* the draft stated in the indictment, and received 8*l.* 16*s.* difference. It appeared from the evidence of one of the clerks, that the firm of the banking-house in *Pall-Mall* consisted at this time of *George* Lord *Kinnaird*, *William Moreland* and *Thomas Hammersley* only; that formerly a Mr. *Griffin Ransom* was a partner in the house; that Mr. *Ransom* had then been dead between seven and eight years, and that at the time he retired from all concern in the business, his place was supplied by his son-in-law, Lord *Kinnaird*; but that the house, particularly in their printed checks, still continued the former *firm* of *Ransom, Moreland* and *Hammersley*, though no other branch of Mr. *Ransom*'s family, except Lord *Kinnaird*, had any interest or profit and loss in the Bank.

THE JURY found the prisoner *Guilty*.

1795.

GILCHRIST'S CASE.

GURNEY, *for the prisoner*, moved, on the ensuing day, in arrest of judgment, upon the ground of *a variance* and repugnance between THE PURPORT and THE TENOR as stated in the indictment. He contended that the *purport* of the bill could only be collected from the bill itself; that it signified the substance of the bill, as appeared upon the face of it. The indictment averred that the bill *purported* to be directed to *George* Lord *Kinnaird*, *William Moreland*, and *Thomas Hammersley*, whereas in fact the bill purported no such thing; for upon the face of it, it appeared to be directed to Messrs. *Ransom*, *Moreland* and *Hammersley*, and to no other persons; and so it is stated in the indictment, where *the tenor* of it is set out: that this repugnance of *the tenor* to *the purport* could not be reconciled by evidence, and therefore the fact of Lord *Kinnaird* being a partner in the house of *Ransom*, *Moreland* and *Hammersley*, afforded no answer to the objection; and he cited the case of *Rex* v. *Reading* (1) at the Old Bailey, in September Session 1793.

(1) *Ante*, pag: 590. Cas: 264.

CONST and KNAPP *for the Crown*, answered those arguments; but

THE COURT ordered the judgment to be respited, and reserved the point for the opinion of THE TWELVE JUDGES.

MR. JUSTICE BULLER, in the July Session following, delivered the opinion of the JUDGES to this effect:—The indictment on which the prisoner was tried, averred in the first count, that the prisoner did forge and counterfeit a certain paper writing, *purporting* to be an order for payment of money, with the name of *Thomas Exon* thereunto subscribed, purporting to have been signed by *Thomas Exon*, clerk, and to be directed to *George Lord Kinnaird*, *William Moreland*, and *Thomas Hammersley*, bankers, and partners, by the names and description of "Messrs. *Ransom*, *Moreland*, and *Hammersley*," for the payment of £.10 to *Mr. Brookes* or order, THE TENOR of which said false, forged, and counterfeited paper writing, purporting to be an order for payment of money, is as followeth, that is to say, &c. with intention to defraud *George Lord Kinnaird*, *William Moreland*, and

1795.

GILCHRIST'S CASE.

Thomas Hammersley, against the form of the statute. The evidence on which the Jury found the prisoner guilty was clear and satisfactory; but it was objected in arrest of judgment, that this order was not technically described, inasmuch as the indictment charged that it purported to be signed by *Thomas Exon*, clerk, and to be directed to *George Lord Kinnaird*, *William Moreland*, and *Thomas Hammersley*, of the parish of *St. James*, bankers and partners. Ten of the Judges met to consider of this case, and their unanimous opinion I shall now state; but it may not be improper, previously to observe, that it is the duty of a good pleader not to clog the record with unnecessary matter, and thereby throw a greater burthen of proof on his client than the law requires; and it is still more his duty not to state things which, on the face of the indictment, are repugnant, inconsistent, or absurd. Old cases have given rise to much learning and argument on the words "*purport* and *tenor*," and the books are full of distinctions as to the meaning of these words and the necessity of using the one or the other of them in indictments where written instruments are to be stated; but among the many cases upon this subject, I can find no judicial determination that *the purport* and *the tenor* should both be stated in any case whatever. PURPORT means the substance of an instrument, as it appears on the face of it to every eye that reads it; TENOR means an exact copy of it; and therefore, where an instrument is stated according to its *tenor*, the *purport* of it must necessarily appear. The forms of indictments for forgery have varied, and been different from each other at different periods of time, and of late years they have been much more complicated than they were formerly, and in my opinion they have been, for that reason, much worse. I have seen the precedent of an indictment of forgery stating "the prisoner to have forged a certain false paper writing in the names of J. S. and others, bearing the form of a warrant of attorney, which said writing follows in these words: that is to say, &c." setting it out *verbatim*; and if indictments for forgery were now merely to state that the prisoner "forged a paper writing to the tenor and effect following,

1795.

GILCHRIST'S CASE.

&c." and the instrument set out, appeared on the face of it to be a bond, or bill of exchange, or any other of the instruments described in the statute, I should, as at present advised, see no objection to such a form. If, in the present case, the indictment had stated that the prisoner had forged a certain paper writing, in the name of T. EXON (*a*), purporting to be a bill of exchange, and then set out the bill to the tenor and effect following, it would, I think, have been quite enough; for the words "purporting to be a bill of exchange," are only necessary to shew that the instrument supposed to be forged, is one of the instruments mentioned in the statute; and in order to shew that it is one of those instruments it cannot be necessary, under the word "*purporting*" to recite all the contents of the instrument, for an exact copy of the instrument itself being set forth, all its contents thereby appear, and the law requires an exact copy of the instrument to be inserted in the indictment, in order that the Court may see that the instrument is the subject of forgery within the meaning of the statute. The blunder in the present indictment seems to have arisen from the circumstance of *Lord Kinnaird*, and *Messrs. Moreland*, and *Hammersley*, carrying on the banking business, under the firm of *Messrs. Ransom*, *Moreland*, and *Hammersley*. The pleader who drew it, forgetting that it was wholly immaterial whether such a firm as *Ransom*, *Moreland* and *Hammersley* ever existed, or who were the persons who constituted that firm, and conceiving it to be material that the names of the real partners interested in the business, should be mentioned, has taken great pains to shew, that a bill drawn on "*Ransom*, *Moreland*, and *Hammersley*," was drawn on "*Lord Kinnaird*, *Moreland*, and *Hammersley*;" and in order to do that, he has averred in the indictment that the bill purports to be

(*a*) But an indictment stating that such a paper writing was *signed by* T. EXON, would be bad; for this is a substantial allegation which must be proved as stated, and if the bill be forged it cannot be a true allegation, and of course cannot be proved to have been *signed by him:* it ought to be "*purporting* to have been signed by T. EXON." See Isaac Carter's Case, York Summer Assizes 1800. 2 East's C. L. 985.

1795.

GILCHRIST'S CASE.

drawn on "*Lord Kinnaird, Moreland*, and *Hammersley*." But the *purport* of an instrument, as I have already observed, is that alone which appears on the face of it; and on the face of this bill, *Lord Kinnaird*'s name does not appear, and therefore the averment is not true (*a*). The consequence is, that the indictment is repugnant and defective, and the prisoner must be discharged from it. But as the objection goes only to the form of the indictment, and not to the merits of the case, he must be remanded to prison until the end of the Session, to afford the prosecutor an opportunity, if he thinks fit, of preferring another and better indictment against him.

(*a*) At the Spring Assizes, 1798, for the county of the town of *Southampton*, one *Edsall* was tried before MR. BARON THOMPSON, on an indictment for forging a Bill of Exchange. The indictment charged that the Bill purported to be an inland bill of exchange, and to be drawn by one C. W. Wright, bearing date, &c. and to be directed to *Richard Down, Henry Thornton, John Freer*, and *John Cornwall, Jun.* bankers in *London*, by the name and description of Messrs. *Down, Thornton and Co.* bankers in London, requiring them to pay to Mr. Wm. Simmons or order 8*l.* 10*s.* and then setting out the tenor, by which it appeared that the Bill was in fact directed "To *Messrs. Down, Thornton and Co. Bankers in London.*" On reference to THE JUDGES in Trinity Term, 1798, the indictment was holden to be bad, on the authority of the Cases of *Rex* v. *Reading*, ante, and the above Case of *Rex* v. *Gilchrist*, 1 East's Rep. 180, *notis*, and see the Case, 2 East's Crown Law, 984. See also *Rex* v. *Reeves, post.*

CASE CCLXXXI. THE KING *against* WILLIAM TILLEY *and* OTHERS.

An indictment on the statute 16 Geo. II. c. 31. which makes it felony to aid and assist any prisoner in *an attempt* to make his escape; charging the prisoner with having aided and assisted such an attempt, need not state that the party aided did attempt to make the escape; for he could not have aided if no such an attempt had been made; but the statute does not extend to a case of such aiding where *an actual escape* ensues.

AT the Old Bailey in April Session 1795, *William Tilley*, and others, were tried before MR. JUSTICE BULLER, on an indictment which stated, "That on the 14th day of March, in the 35th year, &c. at the parish of St. Paul, Covent Garden, in the county of *Middlesex*, JOHN FLOUD, *Esq.* then and there being one of the Justices assigned to keep the peace of our said Lord the King in the county of *Middlesex*; and also to hear and determine divers felonies, trespasses,

1795.

TILLEY'S CASE.

and other misdemeanours committed in the said county, in due form of law did make his warrant of commitment, under his hand and seal, bearing date the same day and year, directed 'To the keeper of New Prison at *Clerkenwell*, or his Deputy,' by which said warrant of commitment, the said JOHN FLOUD, the Justice aforesaid, did require the said keeper or his deputy, to receive into the custody of the said keeper or his deputy the body of *Isdaile Idswel*, therewith sent the said keeper or his deputy, and charged before him the said Justice, upon the oaths of *Thomas Whittard*, *Thomas Major*, and *Joseph Moses*, with feloniously and falsely making, forging, and counterfeiting, in the city of *London*, divers marks, stamps, and impressions, upon certain instruments called Seamen's Powers of Attorney, resembling the mark, stamp, and impression made use of by the Commissioners for managing his Majesty's Stamp Duties, for denoting the stamp duty of six shillings having been paid on each of the said powers of attorney, with intent to defraud his Majesty of the duties thereon, against the statute, &c. AND THAT the said keeper or his deputy, him the said *Isdaile Idswel* should safely keep in the custody of the said keeper or his deputy, until he should be discharged by due course of law; BY VIRTUE OF WHICH said warrant of commitment the said *Isdaile Idswel* afterwards, *to wit*, the same day and year aforesaid, was duly conveyed and committed to a certain gaol of our said Lord the King called the NEW PRISON at *Clerkenwell*, situate in the parish of *St. James, Clerkenwell*, in the county of *Middlesex*, for the cause in the same warrant of commitment above specified, and contained, and then and there, *to wit*, the same day and year aforesaid, at the parish of *St. James, Clerkenwell*, in the said county of *Middlesex*, was kept and detained in the said gaol in the custody of *Samuel Newport*, then and yet keeper of the said gaol, for the felony aforesaid, in the said warrant of commitment expressed, and then and until the third day of April, in the 35th year aforesaid, there was kept and detained in the said gaol for the felony aforesaid: AND THE JURORS AFORESAID, upon their oath aforesaid, do further present, that *Sarah Jones*, late of, &c. widow, otherwise called *Sarah*, the wife of *Is-*

1795. TILLEY'S CASE.

daile Idswel, late, &c. *William Tilley*, late of, &c. gentleman; *Jonathan Jones*, late of, &c. pawnbroker; *William Crosswell*, late of, &c. labourer; *George Hardwicke*, late of, &c. labourer; *James Haydon*, late of, &c. labourer; *John Henley*, late of, &c. labourer; *John Delaney*, late of, &c. labourer; *William Handland*, late of, &c. labourer; *Simon Jacobs*, late of, &c. labourer; *John Solomons*, late of, &c. labourer; and *John Phillips*, late of, &c. labourer, afterwards, *to wit*, on the said third day of April, in the thirty-fifth year aforesaid, with force and arms, at the parish of *St. James, Clerkenwell*, in the said county of *Middlesex*, unlawfully and feloniously were aiding and assisting to the said *Isdaile Idswel*, then and there being a prisoner, lawfully detained in the said gaol, by virtue of the said warrant of commitment, for the felony aforesaid, to attempt to make his escape from and out of the said gaol, against the form of the statute, &c."

THIS indictment was framed upon the statute 16 Geo. II. c. 31. which is intitled "An Act for the further punishment of persons who shall aid or assist prisoners to attempt to escape out of lawful custody;" and after reciting, that "for the further punishment of persons who shall aid or assist prisoners to attempt to escape out of lawful custody," it enacts, "That if any person shall, by any means whatsoever, be aiding or assisting to any prisoner to attempt to make his or her escape from any gaol, although no escape be actually made, in case such prisoner was then attainted or convicted of treason, or any felony except petty larceny, or lawfully committed to, or detained in, any gaol for treason, or any felony except petty larceny, expressed in the warrant of commitment or detainer: every person so offending, and being thereof lawfully convicted, shall be deemed and adjudged guilty of felony, and shall be transported for the term of seven years."—And by the second section it is further enacted, "That if any person shall convey, or cause to be conveyed, into any gaol or prison, any vizor or other disguise, or any instrument or arms proper to facilitate the escape of prisoners, and the same shall deliver or cause to be delivered, to any prisoner, in any such gaol, or to any other person there for the use of any such prisoner, without the consent or privity of the keeper or un-

der-keeper of any such gaol or prison; every such person, although no escape or attempt to escape be actually made, shall be deemed to have delivered such vizor or other disguise, instrument, or arms, with an intent to aid and assist such prisoner to escape, or attempt to escape, &c."

THE EVIDENCE.—*Isdaile Idswel*, a Jew of very notorious character, but possessing great art and subtilty, was on the 14th March, 1795, committed to THE NEW PRISON in *Clerkenwell*, on a charge of having, in confederacy with his brother *Solomon Idswel* (*a*), forged certain stamps against 27 Geo. III. The name of the keeper of the prison was *Samuel Newport*; that of the Clerk of the Papers, *Thomas Roberts*; that of the Under-Keeper, *John Day*, and that of the servant, *William Crosswell*. The prisoner was fettered by *Newport* the moment he was received into custody; confined in a private room opposite to the keeper's room; not permitted to go down, without leave, into the yard, and no one suffered to see him without an order from the Magistrate. *William Tilley* was *Isdaile Idswel*'s attorney, and had a regular order of admission from the Magistrate to visit the prisoner, which he seldom failed to do, at least once, and sometimes twice, a day. The wife also of *Idswel* being either really or affectedly taken ill in the prison, was suffered to remain a night in her husband's apartment. *Jonathan Jones* also, the prisoner's uncle, *Mary Jones*, the consort of *Jonathan Jones*, and the other persons, whose names are mentioned in the indictment, were likewise permitted to visit *Idswel*. On Sunday morning, the 29th March, 1795, *Mary Jones* told *John Day* and *William Crosswell*, that her nephew *Idswel* had an aunt, who lived at No. 13, in *Artillery-lane*, in *Bishopsgate-street*, and that she abounded in riches; but that she was extremely old, and was at that moment lying on the bed of death, expecting every breath to be her last; That she had expressed great anxiety to see her dear nephew *Isdaile Idswel* before she died; and that there was no doubt, as her property consisted entirely in ready money, she would send him back well loaded; for that she had

(*a*) *Solomon Idswel* was tried for this offence at the Old Bailey, in May, 1795, and capitally convicted.

1795.

TILLEY'S CASE.

frequently hinted that it was her intention to give him eight hundred or a thousand pounds. *Crosswell*, who was *Day's* fellow-servant in the prison, lamented the impossibility of taking *Idswel* to *Artillery-lane*, for that having been regularly committed for felony, he could not be permitted to pass beyond the walls of the prison. The lady, however, was not to be discouraged in her suit by this observation, and at length the under-keeper, *John Day*, and his fellow-servant, *William Crosswell*, induced by repeated persuasion, by the strongest assurances of safety, by some trifling gratuities, and perhaps by the hope of sharing the expected bequest, consented to conduct *Idswel*, on the evening of *Good Friday* from the prison to *Artillery-lane*, in his irons, and bring him back again in two hours: This consent was entirely without the knowledge of *Newport*. *Jonathan Jones*, the uncle of *Idswel*, had, on the 24th March, taken a first floor in this house, at No. 13, in *Artillery-lane*; and placed in it a bed and some few articles of furniture, in order to give a better colour to their intended scheme. The *Mary Jones*, who personated the wife of *Jonathan Jones*, but who was the wife of *Idswel*, together with one *George Hardwicke*, *John Henley*, and other persons, contrived to dress up a bolster into the figure of a sick and dying old woman, which they placed in the bed that had been put up in one of the rooms, and furnished the tables with phials, basons, saucepans, and such other articles as generally attend the bed of sickness. On the Friday morning, *William Tilley*, *Idswel's* attorney, visited him as usual, in the prison; and on the evening of the same day, about nine o'clock, *Crosswell*, after going into *Idswel's* room, told *Day* that he had settled the business of *Idswel's* visit to *Artillery-lane*, and that he, *Day*, should accompany him thither; and for greater security should take with him a loaded blunderbuss. *Crosswell* soon afterwards loaded a blunderbuss accordingly, and gave it to *Day*; tied *Idswel's* fetters up with four silk handkerchiefs; disguised him in a rough great coat belonging to another prisoner, and opened the door of the prison, saying as they went out, "Go; "but make haste back; and if you want to see your aunt "again, I will, another evening, go with you myself." *Day*,

thus armed, walked with *Idswel* from the prison to *Smithfield*, where he called a hackney coach, and ordered the coachman to drive to *Artillery-lane*; on turning into the lane, *Idswel* asked the watchman which was *Mr. Cumming's* house; the watchman pointed it out, and they got out of the coach at about one hundred yards from the door, from which they perceived *William Tilley* and his wife walking away as if they had just left the house. On arriving at the door, they found it half open in the hand of *Barnard Solomon*, a Jew, who at this time acted in the capacity of servant to *Mary Jones*, and who had, in that capacity, frequently visited *Idswel* in prison. *Solomon* on seeing *Day* and *Idswel* approach, called out to *Tilley*, who immediately returned, and shaking *Idswel* by the hand, exclaimed, with the appearance of surprise, "*Mr. Idswel!* who would think of seeing you here!"—He then shook *Day* by the hand, saying "good night—don't be afraid of me," and went away. *Idswel* then went into the house, and walked softly up stairs; *Day* following him close behind all the way; and on reaching the landing-place, they turned into the left hand room; but *Day* had scarcely entered, when in a moment, *Hardwicke*, *Heydon*, *Henley*, and *Handland* rushed from their concealment behind the window-curtains, and seizing him by the arms, tore away the sleeve of his coat, tumbled him down two or three stairs, and fell upon him. During this scuffle *Idswel* ran down stairs with intention of making his escape, at the same time exclaiming, "Damn him, he has got a blunderbuss with him." The blunderbuss was at this time under *Day's* coat, with the muzzle downwards; and while he was grasping at the bannisters to save himself from rolling to the bottom of the stairs, *Hardwicke* wrenched it from him, saying, "Damn him, I have got it." At that instant every candle in the house was extinguished; the blunderbuss went off, and *Day*, from part of its contents, received a deep and severe wound on one side of his head, with the blood of which his eyes, his ears, his mouth, and whole face, were immediately overwhelmed. While he lay in this state he was beat with the barrel of the blunderbuss until it broke from the stock; and the four persons who had at first rushed upon him, toge-

1795.

TILLEY'S CASE.

1795. TILLEY'S CASE.

ther with *Jacobs* and *Delaney*, who had now joined them, stamped upon his body with their feet, suspended him from the ground by the hair of his head; and after having endeavoured to strangle him with the handkerchief that was tied round his neck, they rolled him down stairs, and left him senseless, and weltering in his blood on the floor. The report of the blunderbuss, and the noise which the perpetration of this outrage had occasioned alarmed the neighbourhood; a number of persons collected round the door, some of whom broke into the house; and on procuring lights they discovered *Isdaile Idswel* lying in the passage, speechless, with his face on the floor, and torrents of blood issuing from his back. Providence, it seems, had pointed him out as the victim of his treachery; and in his endeavour to escape, he had scarcely reached the bottom of the stairs before the explosion of the blunderbuss lodged its contents in his body, and soon afterwards deprived him of his life (*a*). On searching his pockets, there were found fifty-three guineas, eight watches, a ring, a pair of silver buckles, and a paper, on which was written, "This fellow who goes with me, has a "blunderbuss under his coat, so if you think it will frighten "any of the family, put it off till another day:" On searching the house, all the persons named in the present indictment, except *William Tilley*, were found concealed in different parts of it.

THE Jury found all the prisoners guilty.

KNOWLES, for the prisoner, *Tilley*, moved in arrest of judgment,

FIRST, That the indictment was informal, inasmuch as it did not set forth that *Isdaile Idswel* did attempt to make an escape, or that he did, in fact, make an escape; for that it is not sufficient that the offence is described in the very words of the statute.

(*a*) At the Old Bailey in April Session, 1795, *George Hardwicke* was indicted as principal in the first degree, and *James Heydon*, *John Henley*, *John Delaney*, *William Handland*, *Simon Jacobs*, *John Solomons*, *William Tilley*, and *John Phillips*, as being present, aiding and abetting in the MURDER of *Idswel*; but they were acquitted.

1795.

TILLEY'S CASE.

SECONDLY, That it being proved by the evidence given on the trial, that *Isdaile Idswel* had made an *actual escape*, this was a case to which the provision of the statute 16 Geo. II. c. 31. did not extend.

ON these objections the case was reserved for the opinion of THE TWELVE JUDGES, and the two questions above stated, were argued in the Exchequer Chamber on the 18th April 1796, by KNOWLYS *for the prisoner*, and LOWNDES *for the Crown*.

MR. JUSTICE BULLER, in June Session 1796, delivered the opinion of the Judges as follows:—The prisoners were indicted and convicted at the Session this time twelvemonth, on the statute 16 Geo. II. c. 31. The indictment stated the warrant of commitment of *Isdaile Idswel*, for forgery, made by a Magistrate of the county of *Middlesex*, and that *Idswel*, under that warrant, was committed to *Clerkenwell prison*, and detained there for felony until the 3d of April, on which day the prisoners were unlawfully aiding and assisting the said *Isdaile Idswel*, then being a prisoner in the said gaol, lawfully detained by virtue of a warrant of commitment, to attempt to make his escape out of that gaol. The prisoners were convicted upon this indictment, and *after the verdict*, two objections were made by the Counsel for them. FIRST, That the statute did not extend to any case in which there was *an actual escape*. And, SECONDLY, That the indictment upon the face of it was informal, because it did not in words state that *Idswel* ever attempted to make his escape. These two questions have been argued very fully before ALL THE JUDGES OF ENGLAND in *the Exchequer Chamber*. In the course of that argument MR. KNOWLYS, on the part of the prisoners, relied upon a case reported by *Keilway* (1), to support the objection which he had made to the indictment. The indictment in that case was for felony, in breaking the prison, and *abetting* and *commanding* the prisoner to go at large, but it did not state that the prisoner actually did go at large, and it was decided that as there was no escape expressly stated in the indictment, there could be no felony; for that the abetting and commanding did not import that there was an actual

(1) Keil. p. 87

1795.

TILLEY'S CASE.

escape; but upon this case it is to be observed, that *abetting* and *commanding* to do an act, are very different from *aiding* and *assisting* in the act, and therefore that case will not govern the present: a man may command another to do an act which is never done; when the act is done, the command precedes the act; and therefore the averment of a command does not imply a subsequent execution of that command; but no man can aid or assist another in an act unless the act be done; and therefore the averment that the prisoner aided and assisted in the attempt necessarily implies that the attempt was made. It is impossible to make sense of the words, or to read them intelligibly, without saying in this case that there was such an attempt. Besides this, in the cases of *the King* v. *Glover* (1), and *the King* v. *Manlove* (2), both of which were indictments against the Marshal and Warden for escapes, it was stated only that the defendants permitted the prisoners to go at large, without alleging that they actually did go at large, and yet no objection was taken against either of those indictments.—For these reasons this objection to the present indictment has been over-ruled by the unanimous opinion of all the Judges.

(1) Tremain, p. 244.

(2) Trem. p. 246.

As to the other objection, it was contended that as it clearly appeared in evidence that there was an actual escape, the case did not fall within the scope of the statute 16 Geo. II. c. 31. upon which the present indictment is founded. This is an objection which ought to have been made at the trial, and before the verdict was given; but in criminal cases it is never too late to revise what has been done, and if, at any time, it appears that a prisoner is intitled to an advantage, though the objection be made out of time, the Court will always anxiously endeavour to give the prisoner the benefit of it, and find out some way in which he may avail himself of it. The statute 16 Geo. II. c. 31. enacts, "That if any person shall, by any means whatsoever, be aiding or assisting to any prisoner to attempt to make his escape from any gaol, although no escape be actually made, in case such prisoner then was attainted or convicted of treason, or any felony, &c. he shall be guilty of felony and transported;"

1795.

TILLEY'S CASE.

and the majority of the Judges are of opinion that this statute does not extend to cases where an *actual escape* is made, but must be confined to cases of an attempt without effecting the escape itself. The statute purports to be made for the further punishing of those persons who shall aid and assist persons attempting to escape, and makes the offence felony: it creates *a new felony*, but the offence of assisting a felon in making an actual escape was felony before, and therefore does not seem to fall within the view or intention of the Legislature when they made this statute. Upon this ground, therefore, the majority of the Judges are of opinion that the conviction is improper. But as this objection does not appear on the face of the record, the Court can only assist the prisoners by recommending them to his Majesty for a pardon of this felony, which they mean to do. In point of law the prisoners would still be liable to be indicted for the common law offence, but as they have undergone a long imprisonment already, the Court do not mean to keep them in custody for that purpose.

THE KING *against* JOHN ETHERINGTON.

CASE CCLXXXII.

An indictment for stealing in the dwelling-house, persons being therein and put in fear, must state that the persons were put in fear *by the prisoners*.

8. C. 2 East, 635.

UNDER a special commission of Oyer and Terminer held at *Lewes* in *Sussex*, in May 1795, *John Etherington* and another were tried before MR. JUSTICE BULLER, present MR. JUSTICE LAWRENCE, on the statutes 23 Hen. VIII. c. 1. s. 3. 3 Will. and Mary, c. 9. on the following indictment: "The Jurors of our Lord the King, upon their oath, present, that *John Etherington*, late of the parish of *Meechin*, &c. labourer, and *Henry Brook*, late of the same place, labourer, on the 17th day of April, in the 35th year, &c. with force and arms at the parish of *Meechin*, &c. one watch, &c. (and other articles above the value of forty shillings) of the goods and chattels of one *John Greathead*, in the dwelling-house of the said *John Greathead*, there situate, then and there found and being, he the said *John Greathead*, and one *Mary Emery*, and one *Mary Greathead*, the wife of the said *John Greathead*, then being in the said dwelling-house, and being

1795.

ETHERINGTON'S CASE.

put in fear therein, feloniously did steal, take, and carry away against the statute in such case made and provided, and against the peace, &c." There was A SECOND COUNT in the common way for a robbery on *John Greathead*, in his dwelling-house, and taking from him the goods mentioned in the indictment.

THE Jury found the prisoners Guilty on the first count, of stealing in the dwelling-house, the persons named in the indictment being therein, and being put in fear therein, and that the property was of the value of 39*s.* and Not Guilty on the second count.

BY 23 Hen. VIII. c. 1. s. 3. "No person or persons which shall be found guilty of robbing any person or persons in their dwelling-house, or dwelling-place, the owner or dweller in the same house, his wife, his children, or servants then being within, and put in fear and dread *by the same*, shall be admitted to clergy."

BY 1 Edw. VI. c. 12. s. 10. "No person or persons that hath been attainted or convicted of breaking any house by day or by night, any person being then in the same house where the same breaking was committed, and *thereby put in fear* or dread, shall be admitted to clergy."

AND by 3 Will. and Mary, c. 9. s. 1. "All and every person or persons that shall rob any other person, or shall feloniously take away any goods or chattels, being in any dwelling-house, the owner or any person being therein, *and put in fear*, or shall rob any dwelling-house in the day-time, any person being therein, or shall comfort, aid, abet, assist, counsel, hire, or command any person or persons to commit any of the said offences, shall not have the benefit of his or their clergy."

PARTINGTON moved *in arrest of judgment*, that the first count of the indictment was defective as to the capital part of the charge, because it did not appear with sufficient certainty upon the record that the persons alleged to be in the house were put in fear *by the prisoners*, and thereupon they were intitled to the benefit of their clergy.

1795.

ETHERINGTON'S CASE.

THE point was reserved for the opinion of THE TWELVE JUDGES.

THE CHIEF BARON, at the Summer Assizes 1795, said, the Judges were of opinion that the indictment was defective as to the capital part, for the reason assigned (*a*); but that the prisoners were properly convicted of the *larceny*; and they accordingly received sentence of transportation.

(*a*) On the first consideration of this case most of the JUDGES inclined to think the indictment good in pursuing the words of the statute: they all agreed that it was necessary *to prove* that *the prisoners* put the persons in the dwelling-house in fear, and that such was the meaning of the statute: and they thought that whatever was the construction of the words of the statute, the same must be the meaning and construction of the same words in the indictment. But upon being referred to some precedents of indictments for burglary, in which to oust the offenders of their clergy in case of their standing mute or challenging more than twenty, they were charged with putting persons in fear who were in the houses (under which circumstance they are ousted of clergy by statute 1 Edw. VI. c. 12.) and also to *officium clerici pacis*, 149, 217. *West's Syon.* 8. 234, 245, and 280, tit. Indictments and Offences; and to a precedent of an indictment on the Western Circuit, found at the Summer Assizes for Devon 1710, which charged that the prisoner ANN ANDERSON *domum mansionalem* JOANNÆ SNELL *fregit et intravit, et præd.* JOAN. SNELL *in eadem domo existent: in timore corporali vitæ suæ imposuit*, &c.; they agreed that the prisoners were intitled to their clergy for the defect in the indictment in not stating that the persons in the house were put in fear by the prisoners. S. C. 2 East's Crown Law, 635.

THE KING *against* MARIA THERESA PHIPOE.

CASE CCLXXXIII.

AT the Old Bailey in May Session 1795, *Maria Theresa Phipoe* was tried on the statute 2 Geo. II. c. 25. before MR. JUSTICE GROSE, on an indictment which charged "That *Maria Theresa Phipoe*, late, &c. and *Henry Caddell*, late, &c. on the 14th day of April, &c. with force and arms, at the parish aforesaid, in the county aforesaid, in a certain

To obtain from a person his note of hand by threatening, with a knife held to his throat, to take away his life, is not a felonious stealing of the note within the statute 2 Geo. II. c. 25. for it never was of *value* to, or in the peaceable *possession* of, such person. S. C. 2 East, 599.

1795.

PHIPOE'S CASE.

dwelling-house, near about the highway, there, in and upon one *John Courtoy*, in the peace of God, &c. then and there being, unlawfully and feloniously did make a violent assault, and him the said *John Courtoy* in bodily fear and danger of his life, in the dwelling-house aforesaid, near about the King's highway, then and there unlawfully, violently and feloniously, did put, and *one promissory note* for the payment of money, (to wit) for the sum of 2000*l.* and of *the value* of 2000*l.* of lawful money, &c. signed by and under the hand of the said *John Courtoy*, bearing date March 30th, 1795, the property of him the said *John Courtoy*, from the person and against the will of the said *John Courtoy*, in the dwelling-house near about the highway, then and there violently and feloniously did steal, take, and carry away against the peace, &c." And there was *a second count* on the statute of 12 Anne c. 7. charging, "That *M. T. Phipoe* and *Henry Caddell*, in a certain dwelling-house, feloniously did steal and take by robbery, and carry away *one promissory note*, &c. against the form of *the statute*, &c."

THE circumstances of this case were as follow:—The prisoner, Mrs. *Phipoe*, resided at No. 5, *Hans-place*, in *Sloane-street*, *Knightsbridge*, and had for some years previous to this transaction been intimately acquainted with Mr. *Courtoy*, who was a peruke-maker, of very large fortune, living in *Oxendon-street*, and with whom she was concerned in certain money transactions, both on her own account and on account of a Miss *De Chere*, who was then at *Paris*. Early in the month of *March* 1795, Mrs. *Phipoe* told a Mr. *Francis Bague*, to whom she was indebted, that she was going to settle her cash concerns with Mr. *Courtoy*; that he had promised to give her his note of hand for the balance at one, two, and three months' date; and that she would be obliged to him if he would furnish her with the form in which promissory notes were usually drawn. Mr. *Bague* accordingly gave her the form of a promissory note in *French*, he not understanding the *English* language; telling her at the same time that it must be drawn on a piece of stamped paper; the value of the stamp to be in proportion to the amount of the sum in-

serted in the notes. On a Friday, some time in the beginning of the month of April, she wrote to Mr. *Courtoy*, expressing her surprise that he had not called on her the preceding evening in consequence of a letter she had written to him in the morning respecting Miss *De Chere*'s money, telling him that she was then in perfect health, and that if he did not call early on the morrow about the business she had often mentioned to him, he might expect to see her at his house about eleven o'clock, to which she should insist on being admitted. On Tuesday, 15th April, Mrs. *Phipoe* informed *Mary Brown*, a servant girl who had then only lived with her about five weeks, and who had seen *Courtoy* call on her mistress, that she had written several letters to him, and was greatly surprised he had not yet come. About four o'clock on the same day, a man of the name of *Caddell*, an intimate acquaintance of Mrs. *Phipoe*'s, drank coffee with her in the back parlour; and at seven o'clock the same afternoon, Mr. *Courtoy* knocked at the door, and was shewed into the front parlour by *Mary Brown*, who immediately announced his arrival to her mistress. Mrs. *Phipoe* desired *Mary Brown* to tell him that she was very ill up stairs; that she had got a fire in her room; but that she would dress herself and wait on him as soon as possible. While *Courtoy* was waiting in *the front parlour* Mrs. *Phipoe* went up and down stairs several times between the *bed-room* and the *back parlour*, where *Caddell*, with whom she had been in close and anxious conversation, still remained. She then went into the front parlour, saying to *Courtoy* as she entered, "*Oh, Sir, you are come?*" to which *Courtoy* replied, "*Yes, yes, I am come to settle the business.*" Complaining of the bad state of her health, she pressed the old man to go up stairs; and on his expressing a wish to settle the business below, asked him what he was afraid of, and insisted on his going up. They accordingly went together into the two pair of stairs front room; *Mary Brown* following them with a lighted candle; but the very moment they entered the room door, Mrs. *Phipoe* seized him by the collar, and exclaimed, "*Mary, take hold of his back.*" The girl obeyed; and, while he called out, "*Mercy, have mercy, Theresa!*" they

1795.

PHIPOE'S CASE.

pushed him into a two-armed chair, by the side of which lay a broad blue ribband, with which they endeavoured to tie his right hand to the elbow of the chair, but on his resisting, and promising very fervently to do whatever Mrs. *Phipoe* desired, they desisted. During the struggle he had got his right knee on the seat of the chair, and throwing himself back, endeavoured with his left foot to kick Mrs. *Phipoe* from him. Near to the chair stood a table covered all over with black silk, and on it were two candlesticks covered with black, a pair of large horse pistols, ready cocked, a tumbler glass filled with gunpowder, a saucer with leaden balls, two knives, the one a prodigious large carving knife, the other a common case knife, with their handles concealed under black crape, pens, an inkstand, several sheets of paper, and two ropes. On *Courtoy*'s endeavouring to free himself from his assailants as above described, they renewed their attack, by each of them seizing him by the collar, and thrusting him forcibly back into the chair; and while he was in this state of confinement Mrs. *Phipoe* seized the carving knife, and in the French language threatened, amidst the most opprobrious expressions, to take away his life. *Courtoy*, alarmed by this outrageous menace, implored for mercy; and having by submission and promises in some degree mitigated her violence, they talked to each other for a few minutes in the French language, and then Mrs. *Phipoe* proposed to send *Mary Brown* out of the room, to which *Courtoy* assented, and she was accordingly dismissed into the back parlour where *Caddell* was still waiting. In about twenty minutes she was again summoned by a violent knocking on the floor to attend her mistress's room; and taking *Caddell*'s candle she went up stairs, where she found the parties exactly in the same situation in which she had left them; *Courtoy* cringing into the chair and Mrs. *Phipoe* brandishing the carving knife in her hand, while she desired her to tell the *gentleman in the back parlour to come up stairs directly.* *Caddell*, on being informed of this request, went immediately up stairs, but returned soon afterwards to the back parlour; but he had scarcely been there ten minutes before he was again with great violence and vociferation summoned to attend, which

1795.

PHIPOE'S CASE.

he did immediately, and immediately returned as before. In about a quarter of an hour Mrs. *Phipoe* again knocked, but with much less violence against the floor, and on *Mary Brown*'s going into the room, she observed *Courtoy* sitting in the two-armed chair, with a pen in his hand, writing on the table before him; Mrs. *Phipoe* still standing over him in a menacing attitude, with the carving knife in her hand; but he not being able to make the pen write well, she took it from him, gave it to *Mary Brown*, and desired her to ask *Caddell* to mend it, which she did accordingly, and returned it to her mistress, who gave it to *Courtoy*; and soon afterwards taking up the paper on which he had been writing, said, "*This* "*man has spelt something wrong; take it and shew it to the* "*gentleman below.*" *Mary Brown* took it accordingly to *Caddell*, who made a fair copy rightly spelt, and sent both original and copy up stairs. Mrs. *Phipoe* then, in the hearing of *Mary Brown*, desired *Courtoy* to write another note, on a new stamp, exactly like the copy, but he said he could make them correspond; which he did by altering the word "*too*" to "*two.*" The note was as follows:

"March 30, 1795.

"TWO MONTHS after date I promise to pay to *Miss Ma-* "*ria Theresa Phipoe*, or order, the sum of TWO THOUSAND "POUNDS sterling for value received.

"JOHN COURTOY,

"*Oxendon-street.*"

DURING the conflict in which this note was obtained, one of *Courtoy*'s fingers was cut to the bone, and Mrs. *Phipoe*, having got the note, lamenting the accident, bound up the wound, and solicited him to recruit his spirits with a glass of wine; but he refused the offer, went immediately away, and the next morning gave information to the magistrates at *Bow-street* of what had passed, on which Mrs. *Phipoe* was soon afterwards apprehended, and the note found upon her; but *Caddell* had made his escape.

FIELDING and GARDINER, *for the prisoner*, contended, FIRST, That she could not be convicted upon this evidence,

1795.

PHIPOE'S CASE.

for that, to constitute the crime alleged against her by this indictment, it was necessary that the property, (supposing for the purpose of the objection, that this note could be legally considered as *property*,) should be taken from *the possession* of the owner, and against his will; and that the property so taken must be of some value; for that the statute 2 Geo. II. c. 25. only extended to secure valid existing securities in the possession of the party robbed; but that this note never was of any value while it was in *Courtoy*'s hands, and that if it had been of value it never was the property or in the quiet possession of the prosecutor. The only value was the scrap of paper on which the note was written, but it was clear that the paper and the stamp on it were the property of the prisoner, and never out of her possession; and that as property implied dominion, it never could be said to be the property of *Courtoy* even for a moment, and that the prisoner could not be said to have stolen the note, for that in fact she had obtained it by duress. SECONDLY, they moved in arrest of judgment, That as this indictment was founded on the two statutes of 2 Geo. II. c. 25. and 9 Geo. II. c. 18. by which last Act the expired statute 2 Geo. II. c. 25. was revived, and on 12 Ann. c. 7. it ought to have concluded in the plural number, "against the form of the *statutes* in such case made and provided," whereas the conclusion was in the singular number only (*a*).

(*a*) In the argument at Serjeants' Inn Hall it was, on this point, contended by the Counsel for the Crown, that a statute continuing or reviving another was not the statute creating the offence, but that the offence was referable to the original statute alone: and three several precedents were referred to on this subject. 1. The case of *Robert Clark*, who was convicted on an indictment at the Old Bailey September 1791, for stealing money, goods, and a Bank-note. 2. The case of *J. Randal*, convicted at the Old Bailey May 1792, for stealing a note in a house, and he was executed. 3. The case of *Lawrence Jones*, convicted of the same offence at the October Session 1793; in all which the indictments concluded "against the form of the statute." 2 East, C. L. 600. But it became unnecessary for THE JUDGES to give any opinion on this point. Those who adverted to it thought the form of the indictment good; and that the *re-enacting statute* was the only statute in force against the offence:

1795.

PHIPOE'S CASE.

On these objections the case was saved for the opinion of the TWELVE JUDGES, and it was argued by Counsel at Serjeants' Inn Hall on the 4th February 1796.

MR. JUSTICE ASHHURST, in February Session 1796, delivered the opinion of the Judges to the following effect: On the trial of this indictment, two objections were submitted to the consideration of the Court. THE FIRST was, that the offence, if any had been committed, was, according to the evidence, contrary to, and in violation of, several Acts of Parliament, and therefore the indictment should have concluded "against the form of the *statutes* in such case made and provided" in the plural number, and not in the singular, "against the form of the statute." THE SECOND OBJECTION was, that the promissory note was of no value, and therefore not within the meaning of the statute 2 Geo. II. c. 25. The Judges are of opinion, that as the Legislature at the time of passing the statute 2 Geo. II. c. 25. s. 3. whereby the stealing a *chose in action* was made felony, could not possibly have a case like the present in contemplation, it is not within that Act of Parliament; that it is essential to larceny that the property charged to have been stolen should be of some value; that the note in the present case did not, on the face of it, import either a general or a special property in the prosecutor; and that it was so far from being of any the least value to him, that he had not even the property of the paper on which it was written; for it appeared that both the paper and the ink were the property of Mrs. *Phipoe*, and the delivery of it by her to him could not, under the circumstances of this case, be considered as vesting it in him; but if it had, as it was a property of which he was never, even for an in-

and so it was afterwards expressly holden in the case of *William Morgan*, who was convicted before LAWRANCE J. at Reading Lent Assizes 1796, upon an indictment for stealing Bank-notes against the form of the statute, with which THOMPSON B. whom he consulted on the occasion, declared his concurrence; considering the reviving statute as in effect re-enacting the provisions of the expired law, and 2 Hale, 178, and Cro. Eliz. 750, which were cited, agree: but refer the offence to the first statute, 2 East, C. L. 601.

1795.

PHIPOE'S CASE.

stant, in the peaceable possession, it could not be considered as property taken from his person; and it is well settled, that to constitute the crime of robbery, the property must not only be valuable, but it must also be taken from the person and the peaceable possession of the owner. The Judges therefore are of opinion that the judgment ought to be arrested (*a*).

But Mrs. *Phipoe* was detained in custody, and at the ensuing Session for *Middlesex* was prosecuted for *the misdemeanour*, and convicted.

(*a*) Nine of the Judges expressly held that the offence was not within the statute, which some said was only intended to protect existing available notes in the hands of the person from whom they were taken, and that this note did not come within that description, being of no value in the hands of the prosecutor. Others inclined to think that the note was of value from the moment it was drawn, but that it never was in the possession of the prosecutor, but continued all the time in the possession of the prisoner herself, by whose duress the prosecutor was compelled to make it: and in particular Eyre, C. J. observed that the property never existed till the force, but arose out of it; and therefore it was different from the case of money: and admitting that if the prosecutor had brought the note in his pocket, it would have been a case within the Act, though the note would not be available while in his possession (upon which point he should have hesitated) yet this was not that case. But all the nine Judges considered that the whole transaction was one continued act, and that the note was procured by duress and not by stealing. Ashhurst, J. who differed, thought that it was not a single act; but that there was a distinguishable interval between the writing of the note and the actual taking of it by the prisoner, during which the prosecutor had the possession of it; and that therefore it was taking from him an instrument of value within the meaning of the statute, as it would have been available against him in the hands of an innocent holder, and on this ground also Macdonald, C. B. doubted: Mr. Justice Buller was absent. 2 East's C. L. 600, 601.

CASE CCLXXXIV.

THE KING *against* CHARLES PALMER.

A person who hires *a ready furnished house*, is not guilty of felony within the statute of 3 & 4 Will. III. c. 9. s. 5. by stealing any of the goods let to him to use with the said house. S. C. 2 East, 586.

THE prisoner, *Charles Palmer*, was indicted at *Horsham*, at the Summer Assizes for the county of *Sussex*, in the year

1794; but on an affidavit of the absence of a material witness, the trial was put off until the Lent Assizes at *East Grinstead* in 1795. 1795.

PALMER'S CASE.

THE indictment stated, "That *Charles Palmer*, late of the parish of *Brighthelmstone* in the county of *Sussex*, on the 25th March 1794, at the parish of *Brighthelmstone* aforesaid, eight silver table-spoons and seven silver tea-spoons, of the goods and chattels of *James Gregory*, (the same goods and chattels being in a certain *lodging-house* of the said *James Gregory*, there situate, let by contract by the said *James Gregory* to the said *Charles Palmer*, and to be used by the said *Charles Palmer* with the *lodging-house* aforesaid,) then and there being found, feloniously did steal, take, and carry away, against the form of the statute." The second count stated the *lodging-house* to have been let to the prisoner by *Anne Pearce*, as the servant and agent of *James Gregory*. The third and fourth counts respectively described the house as "certain *lodgings*," let to the prisoner, 1st, by *James Gregory*, and 2dly, by *Anne Pearce*. And the fifth count charged it as a larceny at common law.

IT appeared in evidence, that the prosecutor *James Gregory*, by *Anne Pearce* his agent, on the 22d February 1794 let to the prisoner a ready-furnished house at *Brighton* for a month, and gave him an inventory of the furniture, under an express contract, that *if any of the goods therein specified should be injured or missing at the end of the time, he* the prisoner *should make them good;* that the keys of the house were accordingly delivered to him; that he took possession thereof; lived in the same; and hired and employed his own servants; and that he feloniously took away the said spoons, which were afterwards found in his possession.

IT was objected by the Counsel for the prisoner, that the statute 3 & 4 Will. and Mary, c. 9. only extends to *furnished lodgings*, and not to cases where the *whole house is let ready furnished.*

THE Jury found the prisoner *Guilty;* but the point was reserved for the consideration of the TWELVE JUDGES; and on

1795. PALMER'S CASE.

Tuesday, 16th June 1795, it was argued in the *Exchequer Chamber* before all the JUDGES, except MR. JUSTICE ASHHURST, who was indisposed, by BARROW *for the prisoner*, and by JOHN LEACH *for the Crown.*

BARROW, *for the prisoner*, contended, FIRST, That the taking of goods let with a ready furnished lodging was not felony at common law; SECONDLY, That a ready furnished *house* is not a *lodging* within the meaning of the statute 3 Will. and Mary, c. 9. s. 5. and THIRDLY, That if it were, the *particular terms* upon which the contract in the present case was made, would prevent the taking from being considered felonious.

THE FIRST POINT. By the common law, where furniture was let to be used with the apartment hired, a special property in the goods was held to be vested in the taker, and he having a complete *possession* of them, by delivery from the owner, could not be guilty of felony in taking them away. "If a man," says GLANVIL (1), "lend me *rem suam ad usum inde mihi percipiendum in servitio meo*, the time being expired, I am bound to make restitution; but if I use it at another place, or beyond the time agreed upon, I am bound to make amends, but *a furto excusatur per hoc quod initium habet detentionis per dominium rei.*" So also PULTON (2) speaks to the same effect, "a bare possession by the consent of the owner, nay, of one that is not owner, as of a wife, will make a taking not felonious; for if she deliver her husband's goods to a stranger, and he run away with them, it is no felony." And in *Mary Raven's Case* (3), at the Old Bailey in October Session, 14 Car. II. who was indicted for stealing two blankets and other goods, which, it appeared by the evidence, she had taken from a lodging which she had hired of one *William Cannon* for three months; it was agreed by Lord Bridgman, L. C. J. Kelynge, Mr. Justice Wilde, and the Recorder of London, that this was no felony, because she had a special property in the goods by her contract, and so there could be no *trespass*; and there can be no *felony* where there is no *trespass*; and to support this doctrine, the case of *Rex* v. *Holmes* (4) was cited, where *Holmes* was in-

(1) Glan. Lib. 10. c. 13.

(2) Pulton de pacis regis et regni, fol. 129.

(3) Kely. 24.

(4) Cro. Car. 376.

dicted for *arson*, and it appeared that he had set his own house on fire, which had been quenched before it went farther. It is true, that the cases of burglary in the same book (1), hold a different doctrine. But this point, whatever the opinion of law therein may have been, was solemnly decided in the year 1691, in the case of *Rex* v. *Meares* (2), upon a *special verdict* which found, "That *Susan Vicars* took a lodging-room in the house of *Richard Grey*, furnished with the goods mentioned in the indictment, from week to week; that the key of the door was delivered to *Susan Vicars*, which she kept; that *she* paid one week's payment for the room and lodging, and continued therein about four weeks; and that the two defendants, *Susan Vicars* and *Mary Meares*, on the day laid in the indictment, and before the expiration of the fourth week, took and carried away the goods." And after argument for the prisoners, by Sir B. Shower and Mr. Northey, at Serjeant's-Inn Hall, the majority of the JUDGES were of opinion, that it was no felony; and to prevent the continuation of a practice so contrary to the principles of good faith, the statute 3 & 4 Will. III. c. 9. was almost immediately passed. The prisoners, therefore, cannot be convicted upon the last count in the indictment for the larceny at common law.

1795.

PALMER'S CASE.

(1) Kely. 83.

(2) 1 Show. 50.

THE SECOND POINT, *viz.* That a ready furnished house is not a lodging within the meaning of the 3 & 4 Will. and Mary, c. 9. The statute RECITES, "That whereas it is a frequent practice for idle and disorderly persons to hire lodgings with intent to have an opportunity to take away, embezzle, or purloin the goods and furniture being in such lodgings;" AND ENACTS, "That if any person or persons shall take away, with an intent to steal, embezzle, or purloin, any chattel, bedding, or furniture, which by contract or agreement he or they are to use, or shall be let to him or them to use in or with such lodging, such taking, embezzling, or purloining, shall be to all intents and purposes taken, reputed, and adjudged, to be larceny and felony, and the offender shall suffer as in case of felony." This section of the statute does not in any part of it contain the word "*house*;" but uses the

1795.

PALMER'S CASE.

word *lodging* only. If it be contended, that a house is included in the term "*lodging*," it must arise either from a legal and technical construction of the term well known to the Court, or from its being so understood in the general and fair interpretation of the English language, as used in popular conversation or by correct writers; but the word *lodging* is not a technical expression or law phrase well known to the Court; nor is it used in speaking or in writing, except as descriptive of a *mode of dwelling* different from that of dwelling in a house. It is a term that can only be known to the Court through the medium of the statute. In its popular signification, it is constantly opposed to the word house, and is continually used in contradistinction to that word. But if the two words had been confounded in common speech, the question, in cases where the *mode of dwelling* has come before any Court, has always been, whether that mode of dwelling constituted a lodging or a dwelling-house, and made the occupier a mere inmate or a housekeeper. In asserting that *lodging* is not a technical term familiar to the Court, I mean to say, that in law it is not descriptive of any *substantive thing*, such as a house, a castle, a barn, or the like, but is merely descriptive, as a *participle* or *adjective*, of a certain mode of occupation or enjoyment explainable by evidence. Thus in the case of *Lee* v. *Gansell* (1), the question was wholly whether the mode in which *General Gansell* occupied the room in which he lived made him a *housekeeper*, or, in other words, whether he had a *dwelling-house* or no; not whether he was a *lodger*, but whether his apartment was a *dwelling-house*. The evidence in this case was, that *General Gansell* occupied certain apartments *in the house of another*, having one common door to the street, and this mode of occupation was held not to constitute a dwelling-house, and all the privileges and protection which the law allows to *a house* were refused to him, and his arrest declared to be legal. It is immaterial to the present case, whether *General Gansell*'s mode of occupying the house of another was called *a lodging* or no; for it was positively decided, that the occupying apartments in the house of another did not constitute him a house-

(1) Cowp. 1.

keeper, and his apartments a dwelling-house; or, in popular terms that *a lodging* is not *a dwelling-house*. But although it was determined in *Lee* v. *Gansell*, that *a lodging* is not *a dwelling-house* to protect the occupier from a legal arrest; yet it is contended in the present case, that a *dwelling-house* is a *lodging* to subject the occupier of it to the severest penalties; that although *lodging* and *house* are not convertible terms at common law to protect, yet when used in a penal statute, they are convertible terms in order to convict (1). But supposing *lodging* to be a law term, and to mean something *substantive*, if it shall appear either that a house does not include the notion of lodging, or that a lodging does not include the notion of a house, the convertibility of the terms will be destroyed, and the one cannot be made to supply the absence of the other. In the case of burglary, *Kely.* 83. a man having a dwelling-house, let a cellar, to which the passage was out of the street, and a chamber to *J. S.* who slept in the chamber, and the cellar was broke open in the night time; and on a question whether this was burglary, KELYNGE, *Chief Justice*, thought it was not, and took a difference betwixt *an inmate* and *a divided house*, that is, where there are several doors and one dwelling actually divided and separated from the other; and said, that the nocturnal breaking into such a divided house, with intent to commit felony, would be burglary; but that an inmate who goes in at the same door is in the nature of a lodger, and in such case it must be laid to be the house of the landlord. A lodging then must be taken to be an apartment or apartments in the dwelling-house of another. But in the present case, the whole house was let to *Palmer* for a month; the keys were delivered to him; and he occupied the whole house, and hired and employed his own servants. He might, if he had pleased, have let part of the house into lodgings, and if *his* lodger had purloined any part of the goods so let to him by *Palmer* to use with such lodgings, or if a burglary had been committed therein, it might have been laid as a taking from the dwelling-house of *Palmer*, for he was clearly the proprietor of the whole house during the term. This evinces that there

(1) Kely. Rep. 83.

1795.

PALMER'S CASE.

is an essential difference in the legal meaning of the word *lodging*, supposing it to have a legal meaning, and the word *house*. The legal consequences, indeed, which follow the possession of the one or the other of these sorts of habitation are perfectly distinct and different. If one has *a house* near to another and do not repair it, a writ *de domo reparanda* lies at common law, and supposes *quod reparare debet*, and the writ is good without *solet* (1); but who ever heard of a lodger in the house of another being bound to repair, without a special contract for that purpose? The doors of *a house*, says LORD HALE (2), may not be broken open in arrests unless for treason or felony; but it is settled in the case of *Lee v. Gansell* (3), that the door of *a lodging* may in such case be broken open in civil suits. If a man set fire to his own house, it is not arson at common law, and if *Palmer* had set fire to this house, he would not have been guilty of this offence, as appears from the case of *Elizabeth Hants* (4); but if a lodger set fire to his lodgings, and thereby burns the house, he would be guilty of arson, because he thereby burns *the house of another* (5). The duty on houses, and the tax on windows, are not chargeable on lodgers; for all the windows are considered as belonging to the house; and the landlord and lodger cannot make them different habitations to diminish the duty. These observations shew, that the term *lodging* is, in contemplation of law, both with relation to the place occupied and the person occupying it, perfectly distinct and different from the word *house*. And by resorting to the opinion of the most celebrated English philologers, but particularly to the Dictionary of *Dr. Johnson*, it appears, that these terms are as different in popular acceptation as they are in contemplation of law.—But it may be said, that although a ready furnished house cannot be considered as a lodging, either in the legal or popular sense of these words, it may be so considered within the true meaning and spirit of this Act of Parliament. But it is impossible to imagine, that the Legislature intended to extend the provision of this statute to the protection of a mode of livelihood which does not appear to have existed, or, at least, to have been in general practice;

(1) Tenant *v.* Goodwin, 1 Salk. 360.

(2) H. P. C. 137.

(3) Cowp. 1.

(4) Foster, C. L. 113.

(5) See Rex *v.* Spalding, *ante*, page 218, Case 108; Rex *v.* Breeme, *ante*, page 220, Case 109; and Rex *v.* Pedley, *ante*, page 242, Case 122.

1795.

PALMER'S CASE.

in the year 1691, when this Act passed; for in all the cases upon the subject, anterior to the statute, we read only of lodgings *eo nomine*, and no instance can be produced to shew that the practice of letting houses ready furnished prevailed. It is a practice of modern origin, and seems to have arisen from the improved state of the roads throughout the kingdom by the establishment of turnpikes in the reign of George the Second, and the luxuries and elegancies of life introduced by the increased state of commerce, which have opened a more easy and agreeable communication between one part of the kingdom and another, and led to the modern fashion of visiting watering places at one season of the year; and for which purpose the letting of ready furnished houses became a necessary accommodation. But waiving this conjecture, and looking only at the whole of the statute, it will appear from the context of the section on which the present indictment is founded, that the Legislature could not have ready furnished houses in its contemplation at the time the Act was made. The preamble states, "Whereas it is *a frequent practice* for *idle and disorderly persons* to *hire lodgings*, with an intent to have an opportunity to take away, embezzle, and purloin, goods and furniture being in such *lodgings*;" but can it be imagined, that in those times idle and disorderly persons could so easily procure credit for *ready furnished houses*, as to render the robbing of them a frequent practice; but this preamble, which must be taken as the key by which the enacting clause is to be opened and explained, may be fairly understood to apply to lodgings only, for to that description of apartments the term *hire* peculiarly applies. It is apposite only to such things as, being the property of one, are used for a short time by another, and are of little value. Men *hire* horses and lodgings; but *take* houses and farms, in the making a contract for which the more appropriate terms are "grant, demise, or lett."—The words of the enacting clause, "If any person shall take away, &c. any chattel or furniture, which by contract or agreement he or they are to use, or shall be let to him or them to use *in* or *with* such lodging," seem decisive of the *spirit* of the Act, because they particu-

1795.

PALMER'S CASE.

larly describe the use of furniture in the precise manner in which lodgers generally use it, that is, some *in* the apartments they occupy, and some *with* the apartments; and on the taking a *ready furnished house*, there can be no necessity for a contract for the use of any furniture *with* or *in* the room or lodging: for the tenant must of course use it, or he cannot enjoy the house. These observations apply only to the particular clause in the Act: but on adverting to its *title*, and to the other clauses, it will appear still clearer that this case is not within it. It was made to extend the penal laws against various offences, under the title, "An Act to take away clergy "from some offenders, and to bring others to punishment;" and the framers evidently had it in contemplation to protect property in *dwelling-houses*, under certain circumstances, as well as property *let to use in lodgings*; thus making an express distinction, *eo nomine*, between houses and lodgings, and enacting different punishments against offences committed in each of them. The first section takes away the benefit of clergy from those who rob *dwelling-houses*, and it is not until the fifth section that it is made penal to purloin property from ready furnished *lodgings*. If the Legislature had had in contemplation the mischief assumed in the present case, the word *house*, which they had before used in the statute, would have been used also in the fifth section, nor would it have been left for the Counsel for the present prosecution to supply a word in a penal clause, which word the Legislature might have, but have not inserted. This is a highly penal statute, and it is an universal principle of law which governs cases less favourable than the present, that penal laws shall be construed *strictly* according to the letter, and not *liberally* according to the *spirit* of them, although the particular case under consideration may be within *the mischief* intended to be provided against. Penal statutes, says *Sir W. Blackstone* (1), must be construed strictly. Thus the statute 1 Edw. VI. c. 12. having enacted, that those who were convicted of stealing horses should not have the benefit of clergy, was held not to extend to the stealing of one horse; and a new Act of Parliament was made in the following year, to

(1) 1 Bl. Com. 88.

1795.

PALMER'S CASE.

make the stealing a single horse a capital offence. So also the statute of 14 Geo. II. c. 6. which ousted the stealing sheep *and other cattle* from the benefit of clergy, was held to extend to sheep only, and it was found necessary to pass another act the 15 Geo. II. c. 34. to extend the capital punishment to the offence of stealing bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs, by name; the words in the former act being thought much too loose for this purpose. So also the statute 7 Geo. II. c. 22. which makes the forging of the instruments therein named, with intention to defraud "*any person or persons whatsoever*," a capital felony, was held in the case of *Rex* v. *Harrison* (1), not to extend to *corporations;* and the statute of 18 Geo. III. c. 18. was made to remedy the defect. But again: it is expressly laid down, that a statute which treats of persons or things of an *inferior* rank, cannot be extended by any general words to those of a *superior* rank (2). A *lodging* is a thing of an inferior nature to a *house*, not only as being contained within it, but with respect to the privileges annexed to it, and therefore cannot by any mode of construction be said to mean a house. The genus or larger term "house" is not named in this clause of the statute; and therefore the minor term "lodging" cannot be included in it by implication.

(1) *Ante*, page 180, Case 91.

(2) Bl. Com. 89.

THE THIRD POINT, *viz.* that the *particular terms* upon which the contract in the present case was made, prevents the taking away of the goods from being considered a felonious taking.—This agreement is stated in the prisoner's petition to be heard by Counsel, and forms a part of the present case; and the operation of it goes to his acquittal, in point of law, even if the case should be thought to be within the Act of Parliament. The object of the Legislature in passing it was to prevent a person, who, under a bare contract, unaccompanied with any stipulation, had hired a ready-furnished lodging, from taking away the furniture which was let to him to use with such lodgings, with impunity; and the divesting of lodgers of that qualified property which they possessed at common law, under their contracts, in the furniture so hired, was the means by which this object was ef-

1795.

PALMER'S CASE.

fected. But the statute was never intended to operate so as to prevent those who let lodgings from making such *other contracts* and stipulations with their lodgers, as might not only vest a qualified property in them, but perhaps an absolute dominion over the goods so let to them (*a*). The contract in the present case was not a *bare contract* for the hire and use of the goods, the civil effect of which would have been instantly destroyed by his taking them feloniously away; but this further stipulation was added, that if any of the furniture was *injured* or *missing*, the lessee should make it good. Every person is presumed to possess a competent knowledge of the laws under which he lives; at least, no man can be supposed ignorant of those laws for the purpose of convicting another of a crime: it may, therefore, be legally assumed, that the prosecutor was fully apprized that the civil effect of a bare contract for the use of his furniture would, in the instance of its being taken feloniously away, be entirely defeated, and that he could not, under such circumstances, maintain any action for the recovery of the goods so lost, as the action would have merged in the felony, and the felony have destroyed the contract. Preferring, therefore, his right to recover damages in such case, through the medium of an action, to his power of punishing the lessee by indictment, he has, to intitle himself to this preference, not contented himself with the *bare contract*, against the violation of which the statute was intended to guard, but has added *a special*

(*a*) *Gordon* being the owner of a ready-furnished house at *Shoreham*, in *Kent*, the furniture of which he had bought of a Mr. *Barratt*, his preceding tenant, let the house and furniture to Mr. *Biscoe* for a term of years. During *Biscoe*'s term the goods were taken in execution and sold by the Sheriff, under an execution at the suit of one *Broomhead* for a debt due to him from *Barratt*.—*Gordon* brought an action of *trover* against the Sheriff to recover the value of the goods so sold; but the Court of King's Bench determined, that although the goods had been wrongfully taken in execution, and *Gordon* had the *right of property* in them, yet that, by his having let them to *Biscoe*, he had so completely parted, not only with *the possession*, but even with *the right of possession* of them, during *Biscoe*'s term, that he, *Gordon*, could not maintain the action. Gordon *v.* Harper, Mich. Term. 37 Geo. III. 7 Term Rep. 9.

1795.

PALMER'S CASE.

stipulation in the most express and comprehensive terms, by which he has left it to the option of the prisoner either to leave the goods as he found them, or to *make good* in value such as he should injure, or which should be mis ing, whether by accidental loss or by being taken intentionally away. These are the conditions upon which he delivered to him the entire dominion of the goods; not merely requiring compensation for such of them as should be injured or lost, but for such of them as should be in any way missed or not forthcoming at the end of the term: a stipulation under which the prisoner might have altered, and changed the goods, by substituting others in their place, he always remaining responsible in an action for damages for any breach on his part of this special contract. But suppose the prosecutor had no intention to give the prisoner a dominion over these goods, or a right to remove, destroy, change, or take them away, rendering a compensation for any loss sustained thereby, yet having used such expressions in his contract as might lead the prisoner to conceive that he had such a right, he cannot now convert his misconstruction of the terms into a felonious act. A law work of considerable authority, the *Mirror of Justices* (1), says, "Larceny is the taking of any moveable *treacherousment*, against the will of the owner, by an unlawful gaining the possession of them; because, if the cloyner did apprehend the goods to be his own, and that he might well take them, in such case he is not guilty of this crime: nor where he apprehends that it pleased the owner that he should have them; but of this there must be an apparent evidence and presumption." And *Sir Bartholomew Shower*, who quotes this passage with approbation in his argument in the case of *Rex* v. *Meeres* (2), adds, "Now from hence I infer, that in those ancient times two things did excuse a *tortious taking* of goods from the guilt of larceny, *viz.* FIRST, a contest or claim of property, and a taking in pursuance of such claim; and this is allowed by constant experience: or SECONDLY, a delivery or consent of the owner that the party should have them. Now, in either of these cases, it is not larceny, though the person hath not the true real property

(1) Cap. 1. s. 10.

(2) 1 Show. 52.

1795.

PALMER'S CASE.

in the first case, but is mistaking; and *though he do exceed, or outdo, and go beyond the authority of the owner*, in the latter case." In the present case there is not only apparent evidence and presumption that the prosecutor consented that the prisoner should have the goods, but there is his express agreement to that effect under his own hand. Special contracts for the delivery of property, either for use or trial, are extremely common in this, and must necessarily be so in every commercial country; and the party contracting for the use or trial of such property, has, by the delivery of it, an absolute right thereto, until he chuses, by returning it, to revest it in the original owner; and when such contracts contain, like the present, a special agreement for a compensation in case the property is not returned, the non-return of it cannot be converted, against the express agreement of the parties, into a felonious act. All parties under express agreements must rely and act upon the terms of such agreements; for if it were construed felony for a person, acting under such a contract, to dispose in any manner of the property which may so come into his possession, there are few persons who may not, in their various transactions with the world, be involved in this dreadful predicament, where the felony is complete the instant the property is disposed of, and before he may have an opportunity to pay for it, or to make it good; and the circumstance of the special terms of this contract having been *imposed by the prosecutor* on the prisoner, certainly distinguishes this case from those cases of constructive felony which have been before decided by the Court.

THESE arguments were replied to by the Counsel for the Crown.

SIR A. MACDONALD, *Chief Baron*, at the Summer Assizes held at *Lewes* for the county of *Sussex* in the year 1795, ordered the prisoner to be discharged, saying, "I am sorry that the laws of *England* have not provided for your case, for I have no doubt whatever of your guilt (*a*)."

AND the prisoner was discharged accordingly.

(*a*) On 25 June 1795. All the JUDGES (in the absence of GROSE J.) agreed that this was not a case within the act of parliament. EYRE C. J.

1795.

PALMER'S CASE.

said it was meant to apply to cases where the owner had *a possession*, and the lodger *the use*, and was made to obviate a doubt as to the owner's possession: and BULLER J. referred to the statute 30 Geo. II. c. 3. as explanatory of the word lodger, which gives a penalty against *householders* for not giving an account of their *lodgers* to the assessors of the land-tax. It was also thought by some that the agreement to make good what should be missing took this case out of the statute." 2 East, 586.

THE KING *against* WILLIAM DEAN.

CASE CCLXXXV.

The stealing a *bank note* in a dwelling-house is a felony within the meaning of the words "money, goods, chattels, wares or merchandises" in the 12 Ann. c. 7. S. C. 2 East, 646, 749. See also Rex v. Watson, *Ante*, page 640, Case 277.

AT the Old Bailey in July Session 1795, *William Dean* was tried before MR. JUSTICE LAWRENCE for stealing, on the 24th June preceding, *a Bank-note*, of the value of twenty pounds, the property of *James Massey*, in his *dwelling-house*.

THE prosecutor rented the house in which he resided, in *Margaret-street, Cavendish-square*. The prisoner lived with him as a menial servant. The Bank-note in question was in Mr. *Massey*'s pocket-book, and the book was in his coat-pocket. On the evening of the 23d June 1795, on his retiring to rest, he pulled off his coat, and left it, as it was customary with him to do, in the room below stairs; and putting on his dressing-gown, went up stairs to bed. The prisoner, in brushing the coat the next morning, discovered the pocket-book, and emptied it of its contents. Soon after breakfast Mr. *Massey* discharged the prisoner from his service; and not long after he was gone, he went to get some change out of his pocket-book, and missed the note. The prisoner, on being apprehended, confessed that he had taken the note; that he had changed it; and had purchased clothes with a great part of its produce.

ALLEY, *for the prisoner*, contended, that as the statute 12 Anne, s. 1. c. 7. which makes the stealing of "any money, goods or chattels, wares or merchandises, of the value of forty shillings, a capital offence," was passed so long anterior to the statute 2 Geo. II. c. 25. s. 3. which makes it felony to steal Bank-notes, and other *choses in action* therein described, it could not possibly be intended that the Legislature meant

1795.

DEAN'S CASE.

to include Bank-notes or other *choses in action* within the general words "money, goods, chattels, wares, or merchandises," of the 12th Anne, c. 7. they not being at that time the subjects of felony, and it having been decided in the case of *Rex* v. *Morris* (1), that the receiving of Bank-notes, knowing them to have been stolen, is not within the statute 3 Will. and Mary, c. 9. which makes the receiving of stolen *goods* or *chattels* felony: and he cited the case of *Rex* v. *Dunmore*, at the *Essex* Lent Assizes 1793, where the prisoner was tried for stealing a Bank-note of the value of five guineas, the property of *Jacob Wright*, in his dwelling-house, and acquitted of the capital part of the charge, on a similar objection (2).

(1) *Ante*, page 468. Case 216.

(2) *Sed vide* the note to the Case of Rex v. Morris, *ante*, page 468.

THE Jury found the prisoner GUILTY; but the judgment was respited, and the case saved for the opinion of the TWELVE JUDGES.

THE RECORDER, in May Session 1796, ordered the prisoner to be put to the bar, and informed him that the JUDGES were unanimously of opinion, that the objection his Counsel had made was ill-founded; that the offence with which he was charged, was properly charged to be a capital offence within the statute 12 Anne, c. 7.; and that his conviction was a legal and proper conviction; for that the statute was intended to protect every species of property.

THE prisoner received judgment of death accordingly.

CASE CCLXXXVI.

THE KING *against* JOHN LONGMEAD.

A statute, intitled "An Act to indemnify certain persons upon the terms *in this Act* mentioned, and *for relief* of officers, &c." is continued by a subsequent statute made for that purpose, although, in reciting its title, it is said, "upon the terms *therein* mentioned, and *for the relief* of officers, &c.;" for the Legislature in continuing a statute are not bound to use any particular form of words.

AT the Old Bailey in October Session 1795, *John Longmead* was tried before MR. JUSTICE HEATH, on an indictment which stated, that "*John Longmead*, together with *Thomas Perry* and *John Fowler*, and divers other persons, to the number of three persons and more, on the 5th March, in the

thirty-fourth year, &c. with force and arms, at the parish of *Tallance*, in the county of *Cornwall*, being armed with fire-arms and other offensive weapons, &c. unlawfully did assemble together, in order to be aiding and assisting in taking away from *David Llewyn*, one of the officers of excise of our Lord the King, one hundred gallons of foreign brandy, the said foreign brandy being liable to custom duty, after seizure by the said *David Llewyn*."

THIS indictment was founded on the statute 19 Geo. II. c. 34. and the prisoner was convicted of the charge on very clear and satisfactory evidence.

SHEPHERD, *for the prisoner*, moved, in arrest of judgment, that the statute 19 Geo. II. c. 34. was not continued by the statute 28 Geo. III. c. 23.

AND the case was saved on this point for the consideration of the TWELVE JUDGES.

MR. JUSTICE GROSE, in the December Session following, delivered the opinion of the JUDGES to the following effect: —The statute 19 Geo. II. c. 34. is intitled, "An Act for the further punishment of persons going armed or disguised, in defiance of the laws of custom and excise, and for indemnifying offenders against these laws upon the terms *in this Act mentioned*, and *for relief* of officers of the customs in informations upon seizures." The statute 28 Geo. III. c. 23. continues the "Act for the punishment of persons going armed or disguised, in defiance of the laws of custom or excise, and for indemnifying offenders against those laws upon the terms *therein* mentioned; and *for the relief* of officers of the customs in informations upon seizures." It was not from any doubt which the learned JUDGE who tried this indictment entertained on the question, but from abundant caution in favour of life, that this case was laid before the JUDGES. It has, however, been very attentively considered by them, and they are unanimously of the opinion I shall now proceed to state. The argument on the motion in arrest of judgment was, that the statute 19 Geo. II. c. 34. is not continued by the 28 Geo. III. c. 23. because this last

1795.

LONGMEAD'S CASE.

statute, in describing the title of the former statute, has, instead of the words "*in this Act mentioned*," used the words "*therein mentioned*;" and instead of the words "*for relief*," it uses the words "*for the relief*," leaving out the word "*the*." Every man who hears the objection would be shocked at the idea of its being permitted to prevail. It is merely one word substituted for another set of words of the same import, "*therein*" instead of "*in this Act*;" and "*for the relief*," instead of "*for relief*," in which the omission of the article makes no alteration in the sense, nor creates the smallest degree of doubt what the intention of the Legislature was. Every man who hears these objections would, if they were suffered to prevail, be shocked still more, when he was informed, or recollected, that this statute 19 Geo. II. c. 34. is a most beneficial, salutary, and necessary statute; that it is to prevent men going armed with fire-arms, in disguise, in defiance of the laws, and to enable all persons wounded by such offenders, or the executors of persons so wounded, to recover a recompense for the injury which they may have received, and for that breach of the law; and more especially when it is further considered, that this law has been uniformly acted upon ever since 28 Geo. III. c. 23. was passed. The argument in support of the objection was founded upon the three cases of *Mills* v. *Wilkins*, 2 *Salk.* 609. *Bishop* v. *Harecourt*, *Cro. Eliz.* 210. and *Birt* v. *Rothwell*, 1 *Lord Ray.* 210. 343.; but these are cases where persons bringing actions upon penalties have taken upon them to recite the statutes inflicting such penalties; and as such persons must know under what authority they claim such penalties, if they misrecite the statutes on which they claim, it may be taken advantage of as a *variance*, because whoever in pleading undertakes to recite a statute as the foundation of his suit, is bound to recite it faithfully (1); but the present case is not a question of variance, but of construction and intention; and, therefore, these cases do not apply to the present case. The Legislature, when they intend to pass, to continue, or to repeal a law, are not bound to use any precise form of words; for whatever the form of words used for such purposes may

(1) See Boyce *v.* Whitaker, Douglas, 94. Wendham *v.* Palgrave, 1 Stra. 214.

be, if the intention of the Legislature in making an ordinance be clear and obvious, such ordinance must be carried into execution. In the present case the meaning of the Legislature cannot be mistaken. But there are authorities upon this subject, both ancient and modern. In *Sir Michael Foster's* Reports (1) is the case of *Lord Pitsligo.* An Act of Parliament passed in the 19th year of the King, reciting, "That *Alexander Lord Pitsligo*, and other persons therein named, had been in actual rebellion, and were fled from justice;" and enacting, "That the said *Alexander Lord Pitsligo*, &c. &c. shall stand attainted of high treason, unless they surrender themselves to justice on or before the 12th day of July 1746." *Lord Pitsligo* did not surrender in obedience to the Act, and therefore his lands in *Scotland* were surveyed and seized for the use of his Majesty by order of the Court of Exchequer in *Scotland*, pursuant to the Act of the 20th of the King, upon a presumption that he stood attainted by the 19th of the King. *Lord Pitsligo* put in his claim to the lands in the Court of Session by the name of "*Alexander Lord Forbes*, of *Pitsligo*," setting forth, that his ancestor was by letters patent, bearing date the 24th June 1633, ennobled and created A BARON of *Scotland* by the name, style, and title of "*Lord Forbes*, of *Pitsligo*," which title is now descended on him. He therefore insisted, that as he was not rightly named in the Act of 19th of the King, he could not be attainted by that statute, and consequently that his lands were not subject to forfeiture. To this claim the King's Advocate put in an answer, by which he admitted the patent of creation as stated in the claim, but contended that the claimant was *the person* meant, and that he was sufficiently described by the statute. The cause came on to be heard in the Court of Session; and the Lords of Session, by their interlocutor, pronounced that "the said *Alexander Lord Forbes*, of *Pitsligo*," is not attainted by the statute 19th of the King, and therefore sustain his claim, and decree possession of his lands to be delivered to him. From that interlocutor his Majesty's Advocate, in behalf of his Majesty, appealed, and the cause came to a hearing in January 1750; and it was referred to

(1) Fost. 79.

1795.

LONGMEAD'S CASE.

the opinion of the TWELVE JUDGES, who were of opinion, that as he was the person intended and meant by the statute, he was sufficiently described by the name and title of "*Alexander Lord Pitsligo;*" and upon this opinion their Lordships reversed the interlocutor, and dismissed the claim. This is a very strong case in point; and the doctrine has been recognized and confirmed in the case of *Lord Strathaven*, which is so much like the case of *Lord Pitsligo*, that it is unnecessary to cite it: they both prove, that in construing the words of a statute the intention of the Legislature is alone to be considered. In the present case it is not pretended that there is even a doubt but that some statute was intended to be continued, nor is it pretended that these words are applicable to any other statute, or that there is a doubt whether any other statute is continued by it. Then the argument is this, that these words mean nothing, if it was not the intention of the Legislature to continue some Act; and no man can doubt what Act that is, and that the intention is that the whole of it should be carried into execution: the intention is most clearly here to continue the statute 19 Geo. II. c. 23. and whatever is clearly the intention of the Legislature, Courts of Justice are bound to support. I know of no position that would be more fatal in a Court of Judicature than to refuse to understand the words according to the intention, and to depart from decided cases upon a ground inapplicable to the case before them, and founded neither upon law, justice, or good-sense. The JUDGES are unanimously of opinion, that this is not a question of *variance*, but a question of *construction*; that the statute 19 Geo. II. c. 34. is continued by the statute 28 Geo. III. c. 23.; that the indictment is good; and that judgment ought not to be arrested.

THE prisoner accordingly received judgment of death.

1795.

CASE CCLXXXVII.

THE KING *against* JOHN CHIPCHASE.

It is *felony* for the confidential clerk of a merchant to take a *bill of exchange* unindorsed from the bill box, and convert it to his own use; although he was in the habit of transacting the cash concerns of the house from week to week; for as it had not been delivered to him for such purpose by his employer, it is a tortious taking from the *possession* of the master. S. C. 2 East, 567.

AT the Old Bailey in October Session 1795, *John Chipchase* was tried before MR. JUSTICE HEATH, for feloniously stealing on the 16th September, a bill of exchange for 122*l.* 12*s.* the property of *Richard Burkit* and *Thomas Fothergill.*

THE prisoner was clerk to Messrs. *Burkit* and *Fothergill*, and in that capacity had the sole management of their cash concerns; he received the bills and the money which were remitted or was due to his masters; carried bills to the bankers to discount whenever he wanted cash; made payments for freight and other things of the like nature; and settled the balance with his masters at the end of every week. On the 14th September 1795, the bill stated in the indictment was remitted to Messrs. *Burkit* and *Fothergill* by the post. Mr. *Burkit* opened the letter, and gave the bill, which was due the 17th September, to another of the clerks, to get it accepted. The clerk did get it accepted, and then laid it among other bills on his master's desk. On the 16th September, the prisoner went to Messrs. *Le Febure and Co.* in *Cornhill*, his master's bankers, with two bills, one of which was the present bill, and the banker's clerk observing that neither of them were indorsed by *Burkit* and *Fothergill*, asked him whether they were to be entered short or discounted, or what was to be done with them? it being the general custom to have all bills indorsed by the persons who sent them in. The prisoner said he wanted small notes and money for them; and that the money must be full weight and good, as it was for Mr. *Burkit*'s particular use. On the same day, *viz.* Wednesday, 16th September, the prisoner absconded with the monies he had thus received, and was taken under a feigned name from on board a ship at *Falmouth.*

SHEPHERD, *for the prisoner*, contended that from the particular situation in which the prisoner was placed in the service of Messrs. *Burkit* and *Fothergill*, this was not a felonious taking of the bill of exchange, and consequently not a felony within the statute 2 Geo. II. c. 25. He was to all intents

1795.

CHIPCHASE'S CASE.

See 52 Geo. III. c. 63.

and purposes *the cashier* or *agent* of his employers, which was a situation of *trust*, and in that situation the bill had come legally to *his possession*; it was not delivered to him singly for any *specific purpose* (1), but he had it, as he had all the other bills, of his masters, as a general custodee. His situation was precisely similar to the situation of a cashier in the Bank of England, or to a clerk in the Post-Office, and the Legislature long subsequent to the statute 2 Geo. II. c. 25. on which the present indictment was founded, had thought it necessary to pass Acts in order to make the secreting or purloining bills of exchange by servants of the Bank and the Post-Office, felony. And indeed it had been decided in the case of *Rex* v. *Waite*, (2), that it was not felony by the common law for a cashier of the Bank to embezzle an India bond committed to his care pursuant to the statute 12 Geo. I. c. 32. The *taking* in the present case, and that in the case cited, are exactly the same (*a*). The prisoner in the present case had a right to receive the money for this bill; for it was clearly proved by the evidence that he was authorized so to do: it is true that he had no right to convert *the money* to his own use; but the present indictment is for stealing the *bill of exchange* against the form of the statute 2 Geo. II. c. 25. and not for stealing the money at common law. Therefore as the first taking of the bill was not tortious, his receiving the money for it at the banker's, and going away with it, was a mere *breach of trust*, and a civil remedy is the only remedy the prosecutors can look to.

(1) See Watson's Case, 2 East, 564. Paradice's Case, *ante*, 523; Bass's Case, *ante*, 251; and Lavender's Case, 2 East, 566.

(2) *Ante*, page 28. Case 14.

See Rex *v.* John Lavender, 2 East's P. C. 566.

Mr. Justice Heath, who tried the prisoner, was clearly of opinion that this was felony; for this bill was once clearly

(*a*) In the case of *Rex* v. *Waite*, the India Bond had never been in the actual possession of the Bank, and one of the points in that case was, whether the possession of the cashier was not in construction of law the possession of the Bank; but in the present case, Mr. *Burkit* opened the letter in which this bill of exchange had been remitted, and seems never to have parted with it except to the other clerk to get it accepted, who restored it into *his master's possession* by placing it on *his* desk among the other bills: But this point is now settled by the statute 39 Geo. III. c. 85. which see *post*, in the case of *Rex* v. *Joseph Baseley*, Old Bailey February Session 1799. See also statute 52 Geo. III. c. 63. by which the 39 Geo. III. c. 85. is now extended to other persons and things than those mentioned in the latter statute.

in the possession of the prisoner's master, by the clerk who got it accepted putting it among the other bills on his master's desk, from which possession the prisoner took it feloniously away; and the Jury finding him guilty, he was sentenced to transportation for seven years.

1795.

CHIPCHASE'S CASE.

THE KING *against* JOHN HARRIS.

CASE CCLXXXVIII.

AT the Old Bailey in October Session 1795, *John Harris* was tried before THE RECORDER of London for burglariously breaking and entering the dwelling-house of *Henry William Dinsdale*, on the 6th October, and stealing therein a gold watch value 10*l.* &c. the goods of the said *William Dinsdale*.

A nocturnal breaking into a house, of which the owner has no further taken possession than by depositing in it sundry articles of merchandise, neither *he* nor any *servant* of his having slept therein, is not *burglary*; for it cannot be considered the *dwelling-house* of the owner.

S. C. 2 East, 498.

IT appeared in evidence, that Mr. *Dinsdale* had lately taken the house in *Queen-street, Cheapside*, but had never slept in it himself; but on the night of the burglary, and for six nights before, had procured two hairdressers, of the names of *Thomas Nash* and *James Chamberlain*, who resided at *St. Ann's-lane*, near *Maiden-lane*, in *Wood-street*, but in no situation of servitude to the prosecutor, to sleep in this house for the purpose of taking care of the goods and merchandise belonging to Mr. *Dinsdale*, which were deposited in the house.

THE COURT was of opinion, that as the prosecutor had only so far taken possession of the house as to deposit certain articles of his trade therein, but had neither slept in it himself nor had any of his servants, it could not, in contemplation of law, be called his *dwelling-house*.

THE JURY therefore, under the direction of the Court, found him guilty of the *larceny* only, but not guilty of stealing in the dwelling-house, or of the burglary; and he was sentenced to transportation for seven years (*a*).

(*a*) See the case of Lyons and Miller, *ante*, page 185, Case 93; and Hallard's Case, Exeter Spring Assizes 1792; where the tenant of a house which he had then recently taken had put all his furniture into it, and had been frequently there in the day-time, but neither himself or any of his family had ever slept in it, and BULLER, J. held that burglary could not be committed therein. See also the Case of Rex *v.* Norreg Thompson, *post*, Lent Assizes 1796, and the Case of John Davis, *post*, Old Bailey June Session 1800.

1795.

CASE CCLXXXIX.

An indictment on 7 Geo. II. c. 22. with intent to rob must charge that the prisoner made the assault with intent to *rob*, and not merely with intent to *steal* the goods of the prosecutor.

S. C. 1 East, 420.

THE KING *against* JAMES MONTETH.

AT the Old Bailey in October Session 1795, *James Monteth* was tried before MR. BARON HOTHAM present MR. JUSTICE HEATH, on the statute 7 Geo. II. c. 22. which enacts, "That if any person or persons, with any offensive weapon or instrument, unlawfully and maliciously shall assault, or shall by menaces, or in or by any forcible or violent manner demand any money, goods or chattels of or from any other person or persons, with a felonious intent to rob or commit robbery upon such person or persons, the offender shall be adjudged liable to be transported for seven years."

THE indictment stated, "That *James Monteth*, late of the parish of *St. James*, within the liberty of *Westminster*, in the county of *Middlesex*, labourer, on 28th September, in the 28th year, &c. at the parish, &c. with force and arms, that is to say, with a certain offensive weapon and instrument called a wooden stick (*a*), upon one *Walter Smith*, in the peace of God and our said Lord the King, then and there being, unlawfully, maliciously, and feloniously, did make an assault with a felonious intent, the goods, chattels, and monies of the said *Walter*, from the person and against the will of the said *Walter*, then and there feloniously to steal, take, and carry away against the form of the statute in that case made and provided, and against the peace of our said Lord the King, his crown and dignity."

THE COURT was of opinion that this indictment was bad, inasmuch as it did not state the offence according to the description of it in the statute. The offence is an attempt to rob, which always includes force and violence; but the charge that he made the assault with intent *to steal* the goods of the

(*a*) See Sharwin's Case, 1 East, P. C. 421. where the indictment charged the assault to have been made with a wooden staff, and the evidence was that it was made with a great stone, and held well, for that both those weapons produce the same sort of mischief, namely, blows and bruises. The prisoner in this case made no *demand* either of money or goods, but his intention to rob was apparent.

prosecutor, is no description of an intent *to rob* for want of the word "violently." (*a*).

1795.

MONTETH'S CASE.

THE prisoner was accordingly discharged from this indictment, and a new one was preferred against him, stating, "That he, on the 28th day of September, in the 35th year of the reign, &c. George the Third, King of Great Britain, &c. at the parish aforesaid, in the county aforesaid, with force and arms, to wit, with a certain offensive weapon called a wooden stick, which he the said *James* in his right hand then and there had and held, in and upon one *Walter Smith*, in the peace of God and our said Lord the King, then and there being, wilfully, maliciously, and feloniously did make an assault with a felonious intent the monies of the said *Walter*, from the person and against the will of the said *Walter*, then and there feloniously and *violently* to steal, take, and carry away, against the form of the statute, &c. and against the peace, &c."

AND on this indictment he was convicted.

(*a*) On a charge against one *Remnant* on this statute, he was committed "for that with force and arms he made an assault on A. B. with intent feloniously to steal, take, and carry away from his person, &c." and he was bailed because the commitment did not express any offence described by the statute. Rex *v.* Remnant, *ante*, page 583, Case 260.

THE KING *against* COLIN RECULIST.

CASE CCXC.

AT the Old Bailey in January Session 1796, *John Roberts*, otherwise *Colin Reculist*, was tried before MR. BARON THOMPSON, on an indictment for uttering a forged promissory note, of which the following is a copy:

To utter a forged promissory note, knowing it to be forged, is a capital felony, although the note is not stamped.

S. C. 2 East, 956.

"No. 932. £. 5. 5. 0. *Plymouth*, May 24th, 1795.

I promise to pay to bearer, on demand, here or at Messrs. *Hankey*, *Chaplin*, *Hall*, and *Hankey*, Bankers, *London*, Five Guineas, value received.

W. HOWARD.

FIVE GUINEAS on demand.—*Entered.*"

THE note had no stamp upon it; and it was therefore con-

1795.

RECULIST'S CASE.

tended that it could not be given in evidence; the Stamp Act of 31 Geo. III. c. 25. s. 2. enacting "That for every piece of vellum or parchment, or sheet or piece of paper, upon which any bill of exchange, draft, or order for the payment of money on demand shall be ingrossed, written or printed, where the sum expressed therein, or made payable thereby, shall amount to forty shillings, and shall not exceed five pounds and five shillings, there shall be charged a stamp-duty of three-pence" (1); and by sect. 19, "That no bill of exchange, promissory note, or other note, draft or order, nor any receipt, &c. liable to the duties by this Act imposed, or any of them, shall be pleaded or given in evidence in any Court, or admitted in any Court to be good, useful or available in law or equity, unless the vellum, parchment or paper on which such bill of exchange, promissory note or other note, &c. shall be ingrossed, printed, written or made, shall be stamped or marked with a lawful stamp or mark, to denote the rate or duty, as by this Act directed, or some higher rate or duty in this Act contained: and it shall not be lawful for the said Commissioners or their officers to stamp or mark any bill of exchange, promissory note or other note, draft or order, &c. except as herein is otherwise provided."

(1) But by the 37 Geo. III. c. 90. s. 2. it is reduced to a stamp of *one penny*.

THE Jury found the prisoner *Guilty*; but the judgment was respited, and the case reserved for the opinion of THE TWELVE JUDGES.

MR. JUSTICE GROSE, in the May Session following, delivered the opinion of the Judges as follows: The prisoner at the bar was convicted in January Session of uttering and publishing as true a false, forged, and counterfeited promissory note for five guineas, he well knowing the same to be false, forged, and counterfeited. Upon producing this note in evidence on the trial, it appeared that it had not been stamped; and it was therefore objected that it ought not to be received in evidence. This objection has been referred to the consideration of THE TWELVE JUDGES; and I have now to state their opinion on this subject. The crime, as charged against the prisoner by the words of the indictment, was clearly and satisfactorily proved; the objection, therefore,

1796.

RECULIST'S CASE.

does not import the smallest doubt of his guilt, or in any way affect or relate to the legal definition of forgery; for it is clear that he knowingly uttered a false instrument, with intention to defraud; which is the precise offence that the laws against forgery aim to suppress. The proposition arising from this objection is, that the paper-writing stated in the indictment is not a promissory note, because it is not upon a stamp; but the question, whether it is or is not a promissory note, depends upon THE TENOR of the instrument, and not upon the circumstance of its being stamped or not stamped. An instrument in writing, by which one person promises to pay to another person so much money, must, by force of the words, be a promissory note; and the paper-writing in the present case is an instrument precisely of that description. But admitting it to be a promissory note, it is contended that it cannot be given in evidence as such, because it is not stamped. It has, however, been determined in the case of *Rex* v. *Hawkeswood* (1), that a bill of exchange, though not stamped, is an instrument on which forgery may be charged; and the reason given in that case is completely satisfactory, namely, that the Stamp Acts being revenue laws, and not intended to affect the crime of forgery, cannot alter the law respecting it. The stamp is not, properly speaking, any part of the instrument; it is merely a mark impressed on the paper to denote the payment of a duty; and is merely collateral to the instrument itself. To constitute the crime of forgery, it is not necessary that the instrument charged to be forged should be such as would be effectual if it were a true and genuine instrument; for it has been decided, in several cases, that to forge the last will of a person who is not dead, is a capital offence (2); and yet such an instrument never could operate as a will in contemplation of law during the lifetime of the supposed testator. So also in the case of *Japhet Crook*, which is reported by *Sir John Strange* (3), it was determined that forging a lease and release of lands is a capital offence, although drawn under circumstances which, if they had been genuine, would have rendered them ineffectual (*a*). The

(1) *Ante*, 257. Case 129.

(2) Rex *v.* John Coogan, *ante*, p. 448. Case 208. Rex *v.* Sterling, *ante*, p. 99. Case 57.

(3) 2 Stra. 901.

(*a*) The indictment in this case was on the statute 5 Eliz. c. 14. and it charged that *Garbut* and his wife were seised in fee of certain messuages,

1796.

RECULIST'S CASE.

promissory note, in the present case, is of this kind. The purpose for which stamps are ordered to be affixed to various instruments is merely to raise a revenue; and as to the statutes enacting "that no promissory note, bill of exchange, &c. not stamped as therein directed, shall be pleaded or given in evidence in any Court, or admitted in any Court to be good, or available in law or equity;" the Legislature thereby meant only to prevent their being given in evidence when they were proceeded upon to recover the value of the money thereby secured. It is certain that no holder of such an instrument as the present could, if it had been genuine, have founded an action upon it, and given it in evidence as a *promissory note;* but it is equally certain, that it might have been given in evidence on other occasions; as, for instance, if any per-

lands, and tenements, called *Jawick*, in the parish of *Clackton* in *Essex;* and that *Japhet Crook*, intending to molest them and their interest in the premises, forged a lease and release as from *Garbut* and his wife, whereby they are supposed, for a valuable consideration, to convey to him "all that park called *Jawick Park*, in the parish of *Clackton*, in *Essex*, containing eight miles in circumference, with all the deer, woods, &c. thereto belonging." After a verdict for the King, it was moved in arrest of judgment, that the premises supposed to be conveyed were so materially different from those which were really the estate of *Garbut* and his wife, which were houses, lands, and tenements, that it was impossible this conveyance could ever molest or disturb them; that if it had been a true deed, it could not have passed their lands at law, for want of a proper description; and though where lands are improperly described, a Court of Equity will oblige the vendor to convey them by proper words, yet that is only where there is a previous contract for a sale, and they do it on carrying that contract into execution; whereas here is no contract, and the case is no more than if A. had been seised of *Blackacre*, and B. had forged a conveyance of *Whiteacre*, which certainly would not be within the statute. THE COURT, for several Terms, inclined strongly with the objection; but in Easter Term, 4 Geo. II. the Chief Justice declared, that they were all of opinion to overrule it. The words of the Act are "to the intent that the state of freehold or inheritance of any person to any lands, &c. or the right or title of, in, or to the same, shall or may be molested, troubled, defeated, recovered, or changed." By this it appears that it is not necessary there should be a change, or a possibility of a change; it is sufficient that it is done with that intent, and the Jury have found that it was done with intent to molest *Garbut* and his wife in the possession of their lands; and judgment was given for the King.

1796.

RECULIST'S CASE.

son negotiating it were to be sued for the penalty inflicted upon the offence of negotiating such an instrument unstamped, there is no doubt but that it might be given in evidence; and this instance shews most clearly that it was properly received in evidence on the trial of this indictment, notwithstanding the seeming prohibitory words in the statutes. The most material point of consideration in this case was, whether it did not differ from *Hawkeswood's Case*, inasmuch as the bill of exchange there might have been afterwards stamped, as the law then stood; and this promissory note, as the law now is, could not (*a*): but the same argument applies to this case as was used in that; namely, that the Stamp Acts are revenue laws; that the crime of forgery is a false making of any instrument with intention to defraud; that the Stamp Acts do not destroy its nature as a promissory note, but only prevent a recovery from being had on it; and that if the argument in support of the objection were permitted to prevail, the most pernicious consequences would ensue; for then, by a parity of reasoning, the forging of a note upon paper whereon there is a stamp of less value than the law requires, or a bond, or lease and release, or any other instrument where a stamp is required, might be practised with impunity. Upon these grounds it is, that a majority of the Judges are most clearly of opinion that there is no foundation for this objection, and that the conviction is good and valid (*b*).

(*a*) Hawkeswood's Case was in the year 1783, on the Stamp Acts of 22 Geo. III. c. 33. s. 2. and 23 Geo. III. c. 49; but by 24 Geo. III. sess. 1. c. 7. no bill required to be stamped by those Acts shall be permitted to be stamped at any time after the same shall have been written and signed, except upon the payment of 10*l.* and the proper officer is required on payment of the duty, and the 10*l.* to stamp the same. But by 31 Geo. III. c. 25. the bill shall be stamped after it is drawn. See Rex *v.* Morton, 2 East, 955.

(*b*) This case was determined on the authority of Rex *v.* Hawkeswood, and Rex *v.* Morton, *ante*, page 258, *notis*, and the same principle was again recognized in the cases of Rex *v.* Charles Davis before Mr. Justice Gross, Surry Spring Assizes 1796, and in Rex *v.* John Teague before Mr. Justice Le Blanc, Hereford Summer Assizes 1802. 2 East's C. L. 956, 979.

1796.

CASE CCXCI. THE KING *against* VANDERCOMB AND ABBOTT.

If a prisoner be charged with a burglary and stealing the goods, the prosecutor, on failing to prove that these facts were committed on the day laid in the indictment, cannot be admitted to prove that the *larceny* was committed on a prior day.

S. C. East, P. C. 519.

AT the Old Bailey in January Session, 1796, *James Vandercomb* and *James Abbott* were tried before MR. JUSTICE HEATH, present SIR A. MACDONALD, Chief Baron, and MR. BARON THOMPSON.

THE indictment charged the prisoners with having burglariously broken and entered the dwelling-house of *Merial Neville*, spinster, and *Ann Neville*, spinster, about the hour of six in the night of the 19th of November, 1795, and with having stolen a great variety of articles, some of which were laid to be the property of *Merial Neville*; others the property of *Ann Neville*; and others the property of *Susannah Gibbs*; and there was a second count in all respects like the first, excepting that it alleged the house to be the dwelling-house of *Merial Neville* only.

THE house was situated in *Portugal-street*, leading to *Grosvenor-square*, and was inhabited by the two Miss *Nevilles*, who were maiden sisters, and ladies of considerable fortune. On Friday, 17th July 1795, the two ladies went to pass the remainder of the summer at the sea-side, leaving *Susannah Gibbs*, their housekeeper, and another female servant, in the house, with directions to secure the doors and windows, and to follow them on the succeeding Monday; which they did accordingly, after making every window fast, locking every inside and outside door, and leaving, according to Miss *Neville*'s directions, the keys tied together at Mr. *Slack*'s, in *Mount-street*, who locked them up in his own private drawer, where they remained untouched until the 19th November following. On the night of the preceding day the wind had risen to such a height, and blown so violently, that the roofs and chimneys of many houses in London and its neighbourhood received considerable damage; and Mr. *Slack*, on the ensuing morning, thought it advisable to see whether Miss *Neville*'s house had received any injury during the storm; but on his entering the house, although the walls and roof,

1796.

VANDERCOMB'S CASE.

and every other outside part were perfectly secure, he found every inside door broken open, the carpets cut up from the floor, the wine-cellar ransacked, part of the furniture broken, almost every article removed from its place, and some of it packed up, and lying in the passage, ready to be taken away; but no person was found in the house, nor was the breaking by which the entry had been made any where discoverable. Alarmed at finding the property which had been placed under his care, in this situation, he proceeded, after shewing the scene to a number of his friends, and locking the street door with a *double lock*, to give information of these circumstances to the Magistrates at the Public-office in *Bow-street*, who advised him to return immediately to the spot, to conceal himself in some neighbouring place from whence he might observe the house, and to seize such persons as might go there to fetch away the things. He accordingly went to the adjoining house, where he waited until *four o'clock* in the afternoon; but not perceiving any person whom he could suspect, he went home, wrote a letter to the Miss *Nevilles*, to inform them of what had happened, and returned, with his son and his friends, to the reconnoitring station, just as the clock struck *six*; from whence they almost immediately observed, through the joinings of the shutters, the glimmer of a light in the parlour of the house; and on looking through the key-hole, they perceived a man, with a lighted candle in his hand, go from the parlour-door towards the stair-case. Upon this they collected further assistance, to the amount of ten or twelve persons, from the neighbouring public-houses; and entered the house by the street-door, which Mr. *Slack* was now surprised to find only *single-locked*. On going up stairs they met the prisoners coming down. The prisoners at first retreated to the first-floor; but turning round, endeavoured to cut their way through their pursuers; and it was not till after they had made a very desperate resistance, that they were secured. On the return of the Miss *Nevilles* and their servants to town, it appeared, upon an examination of the property remaining in the house, that the several articles mentioned in the indictment, together with many other

1796.

VANDERCOMB'S CASE.

things, had been taken away; but at what time they had been taken could not be discovered. It also appeared that no perceptible alteration had been made in the situation of any of the articles in the house, between the time of Mr. *Slack*'s quitting it, about *three o'clock*, and the time when the prisoners were apprehended; and as they might have entered the house soon after *five o'clock*, when there was still sufficient day-light remaining by which the features of a man's face might have been discovered, the Counsel for the Crown, upon an intimation from the Court that this could not be a nocturnal breaking, abandoned the prosecution for the BURGLARY.

BUT they submitted to the Court that they might proceed to give evidence of the *Larceny*; and contended that if they could affect the prisoners, or either of them, with having removed any one of the articles mentioned in the indictment, it would be sufficient to enable the Court to leave the case to the Jury.

THIS was objected to by the Counsel for the prisoners; for that the prisoners were called upon by the present indictment to answer the charge of a burglary accompanied with a larceny; which case might be attended with circumstances that would intitle them to the benefit of clergy; but that the larceny now proposed to be proved against them was a perfectly distinct felony, of which, as they could not possibly be apprised when they were arraigned upon the present indictment, they ought not now to be called upon to answer.

THE COURT. It seems to be a perfectly distinct felony. It appears most clearly that nothing was taken away after *these* men entered the house; and that there was not such a removal of any one article as will constitute an *asportavit* in contemplation of law. The indictment charges the prisoners with burglariously breaking and entering the house AND stealing the goods; and most unquestionably that charge may be modified by shewing that they stole the goods without breaking open the house; but the charge now proposed to be introduced goes to connect the prisoners with an antecedent felony committed before *three o'clock*, on this day, at which

1796.

VANDERCOMB'S CASE.

time it is clear they had not entered the house. Having tried, without effect, to convict them of the breaking and entering the house, and stealing the goods, you must admit that they neither broke the house nor stole the goods *on the day laid in the indictment*; but to introduce the proposed charge, it is said that they stole the goods on a former day, and that their being found in the house is evidence of it. But this is surely a distinct transaction; and it might as well be proposed to prove any felony which these prisoners committed in this house seven years ago, as the present. The form of the indictment decides the question. If they had been proved, after breaking the house, to have removed any of the articles that were in the house; or if they had been proved to have removed those things that were tied up in bundles from their several places above stairs, into the passage below, that would have been a sufficient removal to answer the *larceny*, if those articles had been included in the indictment; for one of the charges against them would then have been made out, and the only question remaining would have been on the burglary.

THE Jury, thereupon, by the direction of the Court, acquitted the prisoners; but, as the Grand Jury were not discharged, the prisoners were detained in custody, in order to have another indictment preferred against them.

AND accordingly *two indictments* were preferred against them, one charging them with having burglariously broken and entered the house of *Merial Neville* and *Anne Neville*, *with intent* to steal the goods; and the other, with having *stolen the goods* in the *dwelling-house*, stating *other goods* than those stated in the former indictment, and laying them respectively to be the property 1st, of *Merial Neville*, 2dly, of *Ann Neville*, and 3dly, of *Susannah Gibbs*: and they were arraigned upon both indictments; to both of which they pleaded pleas of *autrefois acquit* upon a former indictment.

A prisoner is not intitled to a copy of his indictment to enable him to plead *autrefois acquit*.

THE prisoners, in order that their pleas of *autrefois acquit* might be drawn with greater accuracy, prayed that they might be furnished with copies of the several indictments; but THE

1796. VANDERCOMB'S CASE.

COURT refused to grant them copies, but said they were intitled to hear the indictments read very slowly and distinctly over: and they were accordingly so read by the Clerk of the Arraigns.

IT appeared that the indictment for *stealing in the dwelling-house*, contained other articles, or the same articles differently described, and laid, as to part of them, to be the property of different persons than what were included in the indictment for the *burglary and larceny*, on which the prisoners had been acquitted; and therefore the Counsel for the prisoner withdrew the pleas of *autrefois acquit*, as they did not aver that the goods so added and differently described were the *same goods*, the taking of which constituted the *same offence*; and THE COURT gave them time to consider whether they could by any *averment* bring in issue the question, whether the charges in the *two indictments* did, or did not, in fact, constitute the same offence.

The prisoners *arraigned* on the indictment for the burglary *with intent to commit* the felony.

ON the ensuing morning the prisoners were arraigned on the following indictment:

"MIDDLESEX.—The Jurors for our Lord the King upon their oath present, that *James Vandercomb*, late of the parish of *Saint George, Hanover-square*, in the county of *Middlesex*, labourer; and *James Abbott*, late of the same, labourer; on the nineteenth day of November, in the thirty-sixth year of the reign of our Sovereign Lord GEORGE THE THIRD, of Great Britain, &c. about the hour of six in the night of the same day, with force and arms, at the parish aforesaid, in the county aforesaid, the dwelling-house of *Merial Neville*, spinster, and *Ann Neville*, spinster, there situate, feloniously and burglariously did break and enter, *with intent* the goods and chattels of the said *Merial* and *Ann* in the said dwelling-house, then and there being found, then and there feloniously and burglariously to steal, take and carry away, against the peace of our said Lord the King, his crown and dignity."

Plead over "*Not guilty*" of the said burglary.

To this indictment "the said *James Vandercomb* and *James Abbott*, protesting that they were NOT GUILTY (*a*) of the pre-

(*a*) The plea, as it was originally delivered to the Court, did not *plead*

1796.

VANDERCOMB'S CASE.

mises charged in the said indictment, demand judgment of the said indictment, and all and every part thereof, they having heretofore, by a jury of the country, in due form of law, been acquitted and discharged of the premises in the said indictment above specified, and charged on them, *and for plea* to the said indictment, say, that our said Lord the King ought not further to prosecute them by reason of the premises in the said indictment mentioned: BECAUSE, they say, that heretofore, TO WIT, at this now present delivery of the King's gaol of *Newgate*, now holding for the county of *Middlesex*, at Justice Hall in the Old Bailey, in the suburbs of the City of *London*, they the said *James Vandercomb* and *James Abbott* stood indicted by the names and description of *James Vandercomb*, late of the parish of *Saint George, Hanover-square*, in the said county of *Middlesex*, labourer, and *James Abbott*, late of the same, labourer; FOR THAT they the said *James Vandercomb* and *James Abbott*, on the nineteenth day of November, in the thirty-sixth year of the reign of our Sovereign Lord GEORGE THE THIRD, King of Great Britain, &c. about the hour of six in the night of the same day, with force and arms, at the parish aforesaid, in the county aforesaid, the dwelling-house of *Merial Neville*, spinster, and *Ann Neville*, spinster, there situate, then and there feloniously and burglariously did break and enter, and *one pair of scales*, of the value of two shillings, &c. of the goods and chattels of the said *Merial Neville*, spinster; *two sattin gowns* of the value of sixty-three shillings, the goods and chattels of the said *Ann Neville*, spinster; *one feather-bed* of the value of four pounds, &c. of the goods and chattels of *Susannah Gibbs*, widow, in the said dwelling-house, then and there being found, then and there feloniously and burglariously *did steal, take and carry away*, against the peace of our said Lord the King, his crown and dignity: AND ALSO FOR THAT the said *James Vandercomb* and *James Abbott*, afterwards, TO WIT, on the said nineteenth day of November, in the thirty-sixth year

over; but the Court conceiving this to be absolutely necessary, the prisoners pleaded over to the burglary, "Not Guilty," and it was added to the plea in *parchment*.

1796.

VANDERCOMB'S CASE.

aforesaid, about the hour of six in the night of the same day, with force and arms, at the parish last aforesaid, in the county aforesaid, in the dwelling-house of *Merial Neville*, spinster, there situate, feloniously and burglariously did break and enter, and one pair of scales, &c. of the goods and chattels of *Merial Neville*, spinster; two sattin gowns, &c. the goods and chattels of *Ann Neville*, spinster; and one feather-bed, &c. of the goods and chattels of the said *Susannah Gibbs*, widow, in the said last-mentioned dwelling-house, then and there being found, then and there feloniously and burglariously *did steal, take and carry away*, against the peace of our said Lord the King, his crown and dignity; as by the said indictment now here remaining, affiled of record in the said court of the delivery of the said gaol of our said Lord the King, of *Newgate*, more fully and at large appears. On which said indictment they the said *James Vandercomb* and *James Abbott*, afterwards, TO WIT, at the same session of gaol delivery now holding for the county of *Middlesex* as aforesaid, in due form of law were tried, and by a Jury of the county, then and there in due form of law chosen, tried and sworn to speak the truth of and concerning the premises in the said indictment last above-mentioned, specified, then and there, in due form of law were *acquitted* and found NOT GUILTY of the premises in the said last-mentioned indictment specified and charged on them as they the said *James Vandercomb* and *James Abbott* in their plea to the said last-mentioned indictment in that behalf have alleged, WHEREUPON IT WAS CONSIDERED and adjudged by the said last-mentioned Court there, that they the said *James Vandercomb* and *James Abbott* of the premises in the said last-mentioned indictment specified, should be discharged and go acquitted thereof; and the said *James Vandercomb* and *James Abbott* further say, that they the said *James Vandercomb* and *James Abbott*, now here pleading, and the said *James Vandercomb* and *James Abbott*, in the indictment aforesaid, named, and thereof acquitted as aforesaid, *are the same identical persons*, and not other or different persons; and that the said burglary in the said dwelling-house of the said *Merial Neville* and *Ann Neville*,

The plea of *autrefois acquit* must state the record of acquittal. Rex *v.* Wildey, Maule & Selwyn's Rep. vol. i. page 183.

1796.

VANDERCOMB'S CASE.

in the indictment aforesaid above pleaded, specified, and supposed to be done and committed by them the said *James Vandercomb* and *James Abbott* is *the same identical and individual burglary*, as in the said indictment, to which they the said *James Vandercomb* and *James Abbott* are now here pleading, is supposed and alleged to have been done and committed by them the said *James Vandercomb* and *James Abbott*, and not other or different, TO WIT, at the parish of *Saint George, Hanover-square* aforesaid, and in the county aforesaid; and this *they are ready to verify, &c.* Wherefore they pray judgment of the Court here, whether our said Lord the King will or ought further to prosecute, impeach, or charge them on account of the premises in the said indictment, to which they the said *James Vandercomb* and *James Abbott* are now here pleading, contained and specified, and whether they ought further to answer thereunto; and that they may be dismissed this Court without delay (*a*)."

Demurrer to the plea.

To this plea there was the following *demurrer*:—"And THOMAS SHELTON, Esquire, who prosecuteth for our said Lord the King, in this behalf, cometh and saith that, for and notwithstanding any thing in the said plea of the said *James Abbott* and *James Vandercomb* by them above pleaded, our said Lord the King ought further to prosecute them the said *James Abbott* and *James Vandercomb*, by reason of the premises in the said indictment, to which the said plea is above pleaded, mentioned; because he saith that the said plea and the matters therein contained are not sufficient in law to bar our said Lord the King from further prosecuting them the said *James Abbott* and *James Vandercomb*, by reason of the premises in the said indictment, to which the said plea is above pleaded, mentioned: And this the said *Thomas Shel-*

(*a*) To this plea of *autrefois acquit* the Counsel for the Crown at first proposed to reply *ore tenus*, "*nul tiel record*;" but the prisoner's Counsel insisted that it must be *in parchment*; for that only the Attorney-General could make such a replication *ore tenus*; and THE COURT said that it must be *in parchment*, for otherways the parties would not have equal justice, as by its being pleaded *ore tenus* the prisoners would be deprived of the opportunity of taking advantage of any defect there might happen to be in *the form* of the replication.

1796.

VANDERCOMB'S CASE.

ton is ready to verify. Wherefore he prays judgment that our said Lord the King may further prosecute them the said *James Abbott* and *James Vandercomb*, by reason of the premises in the said indictment, to which the said plea is above pleaded, mentioned; and that the said *James Abbott* and *James Vandercomb* may answer over to the same indictment."

Joinder in demurrer.

To this demurrer there was a joinder as follows: "And the said *James Vandercomb* and *James Abbott* being now here as aforesaid, in their proper persons, under the custody of the said Sheriff of the county of *Middlesex*; say that the said plea of them the said *James Vandercomb* and *James Abbott*, in form aforesaid, above pleaded; and the matters therein contained are sufficient in law to bar our said Lord the King from further prosecuting them the said *James Vandercomb* and *James Abbott*, by reason of the premises in the said indictment to which the said plea is above pleaded, mentioned: And this they are ready to verify, &c. Wherefore, as before, they pray judgment, and that our said Lord the King may be barred from further prosecuting by reason of the premises mentioned in the said indictment, to which the said plea of them the said *James Vandercomb* and *James Abbott* is above pleaded, and that they may be dismissed this Court without delay, &c."

THE question contained in the pleadings was argued in the Exchequer Chamber, before all the Judges, by the two senior Counsel.

A plea of *autrefois acquit* of a burglary where the felony is laid as *actually* committed, cannot be pleaded to an indictment for the *same burglary* laid *with intent to commit* the felony; for they are two distinct and different offences. S. C. 2 East, 519.

MR. JUSTICE BULLER, in June Session, 1796, after stating the pleadings, delivered the opinion of the Judges upon this case. This is a demurrer to a special plea of *autrefois acquit* in bar of an indictment for a burglary with intent to commit a felony. The question raised by this demurrer has been argued before all the Judges of England. On that argument it was contended on behalf of the prisoners, that as the dwelling-house in which, and the time when, the burglary is charged to have been committed are precisely the same both in the indictment for the burglary *and stealing the goods*, on which the prisoners were acquitted; and in the indictment for the burglary *with intent to steal the goods*, which is now depend-

1796.

VANDERCOMB'S CASE.

ing, the offence charged in both is in contemplation of law the same offence, and that of course the acquittal on the former indictment is a bar to all further proceeding on the latter. To support this proposition two cases in *Kelynge's Reports* were relied on. It is quite clear, that at the time the felony was committed there was only one act done, namely, the breaking the dwelling-house. But this fact alone will not decide this case; for burglary is of two sorts, FIRST, breaking and entering a dwelling-house in the night time, *and stealing goods therein*; SECONDLY, breaking and entering a dwelling-house in the night time, *with intent to commit a felony*, although the meditated felony be not in fact committed. The circumstance of *breaking* and *entering* the house is common and essential to both the species of this offence; but it does not of itself constitute the crime in either of them; for it is necessary, to the completion of burglary, that there should not only be a breaking and entering, but the breaking and entering must be accompanied with a felony actually committed or intended to be committed (1); and these two offences are so distinct in their nature, that evidence of one of them will not support an indictment for the other (2). In the present case, therefore, evidence of the breaking and entering with intent to steal, was rightly held not to be sufficient to support the indictment, charging the prisoner with having broke and entered the house, and stolen the goods stated in the first indictment; and if crimes are so distinct that evidence of the one will not support the other, it is as inconsistent with reason, as it is repugnant to the rules of law, to say that they are so far the same that an acquittal of the one shall be a bar to a prosecution for the other. Neither do the authorities quoted on behalf of the prisoners support the proposition contended for; nor are there any legal authorities by which this plea can be maintained. The two cases quoted on behalf of the prisoners were *Turner's Case, Kely.* 30. and *Jones and Beaver's Case, Kely.* 52. *Turner's Case*, as stated by Lord Chief Justice *Kelynge*, was thus: *James Turner* and *William Turner* were indicted for a burglary in breaking and entering the dwelling-house of Mr. *Tryon*, in the night, and stealing

(1) See Joseph Dobbs's Case, 2 East, C. L. 513.

(2) See 2 East, 520, *notis*.

1796.

VANDERCOMB'S CASE.

therein great sums of money: on which *James Turner* was found guilty and executed, but *William Turner* was acquitted. But afterwards there being strong evidence that *William Turner* was concerned in the same burglary with *James Turner*, and there being 47*l.* of the money of one *Hill*, a servant of Mr. *Tryon*, stolen at the same time, which 47*l.* was not laid in the former indictment, the prosecutor intended to indict *William Turner* again for burglary, for breaking the house of Mr. *Tryon*, and taking therein the 47*l.* of the money of *Hill*; "but," says the book, "we all agreed, that *William Turner* being formerly indicted for burglary in breaking the house of Mr. *Tryon*, and stealing his goods, and acquitted, he cannot now be indicted again for the same *burglary* of breaking the house: But we all agreed that he might be indicted for *felony* in stealing the money of *Hill*, for they are several felonies, and he was not indicted for this felony before; and so he was indicted; and afterwards I told my Lord Chief Justice *Bridgman* what we had done, and he agreed the law to be so as we had directed." The decision in this case was not a solemn judgment, for the prisoner was not indicted a second time for *the burglary*; it was merely a direction from the Judges to the officer of the Court how to draw the second indictment for the *larceny*, and it proceeded upon a mistake as I shall presently show. If the Judges in that case exercised a little lenity before the indictment which might more properly have been done after conviction, much censure could not fall on them. But they proceeded on the ground that *William Turner* having been indicted for burglary in breaking the house of Mr. *Tryon*, and stealing his goods, and acquitted thereof, could not be again indicted for the same burglary for breaking the house, though he might be indicted for stealing the money of *Hill*, for which he had not been indicted before: and he was indicted accordingly. The Judges, therefore, must have conceived that the *breaking the house* and the *stealing the goods* were two distinct offences, and that breaking the house only constituted the crime of burglary; which is a manifest mistake; for the burglary consisted in breaking the house and stealing the goods; and if stealing the goods

1796.

VANDERCOMB'S CASE.

of *Hill* was a distinct felony from that of stealing the goods of *Tryon*, which it was admitted to be, the burglaries could not be the same. The fact was that *William Turner* broke into the house of *Tryon*, and at the same time stole the money of both *Tryon* and *Hill*; he had been tried for breaking *Tryon's* house, and stealing *his* money, on which trial the prisoner's life had been in jeopardy for this offence; for he might have been convicted if the prosecutor had used due diligence in bringing forward his evidence; yet the Judges were of opinion that he might be tried for the other part of the same act, *viz.* stealing the money of *Hill*; and if no money belonging to *Tryon* had been stolen, probably the question, in that case, never would have arisen, for then the first indictment would have been wholly inapplicable to the facts of the case, and the prisoner in no danger at all upon it; but that circumstance could not vary the law of the case, and the opinion certainly proceeded from the want of adverting to what was necessary to constitute the crime of Burglary. The case of *Jones and Beaver* proceeded entirely upon the decision in *Turner's Case*, and if the foundation fail, the superstructure cannot stand. There the prisoners were indicted for burglariously breaking and entering the dwelling-house of *Lord Cornbury*, and stealing his goods therein, and being acquitted, were afterwards indicted for the same burglary in breaking and entering *Lord Cornbury's* house and stealing the goods of a Mr. *Nunessey*: and it was agreed that, as they had been before acquitted, they could not be indicted again for the *same burglary*, but that they might be indicted for the felony in stealing the goods of *Nunessey*, precisely as had before been done in *Turner's Case*. But authorities are not wanting to shew the principle and foundation upon which the plea of *autrefois acquit* is built and must be sustained. *Hawkins*, in his Treatise on the Pleas of the Crown (1), says, "If the party were never known by the name in the first indictment, it is questionable whether the prisoner could be found guilty upon it, and if he could not, it seems plain that his life never having been in danger by it, the acquittal upon it cannot be any bar to a subsequent indictment."—*Sir Michael Foster* (2)

(1) Bk. 2. c. 35. s. 3.

(2) Foster, C. L. 361.

1796.

VANDERCOMB'S CASE.

says, " It is clear, that if A. be indicted as principal, and B. as accessary, and both are acquitted; yet B. may be indicted as principal in the same offence, and his former acquittal is no bar:" Again, in page 362, " If a person indicted as principal cannot be convicted upon evidence tending barely to prove him to have been an accessary before the fact, which I think must be admitted, I do not see how an acquittal upon one indictment could be a bar to a second for an offence specifically different from it." In the case also of *The King* v. *Pedley* (1), in the King's Bench, in Trinity Term 1782, which was an indictment for arson, there were distinct counts for burning the house, first, of *Francis Perry*; secondly, of *Thomas Combe*; thirdly, of the Mayor and Corporation of Bristol; and the special verdict found that the Mayor and Corporation of Bristol were seised of three houses; that they demised the same to *Thomas Combe*, who demised the same to *Francis Perry*, who demised them to a person of the name of *Landry*; it was in fact one and the same house differently described in the indictment as belonging to the different persons I have mentioned, except *Landry*; but there was no count for burning the house of *Landry*; and, after argument on this case, the Court of King's Bench were of opinion that as the house was in the possession of *Landry*, none of the counts were proved, and therefore gave judgment for the prisoner; but as he had not been tried for burning the house of *Landry*, he was sent back to *Bristol*, and again tried, though he was acquitted. These cases establish the principle, that unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. Now, to apply the principle of these cases to the present case: The first indictment was for burglariously breaking and entering the house of *Miss Nevilles* and *stealing the goods* mentioned; but it appeared that the prisoner broke and entered the house *with intent to steal*, for in fact no larceny was committed, and therefore they could not be convicted on that indictment; but they have not been tried for burglariously breaking and

(1) *Ante*, page 242. Case 122.

1796.

VANDERCOMB'S CASE.

entering *Miss Neville's* house *with intent to steal*, which is the charge in the present indictment, and therefore their lives have never been in jeopardy for this offence. For this reason the Judges are all of opinion that THE PLEA is bad; that there must be judgment for the prosecutor upon the demurrer: and that the prisoners must take their trials on the present indictment.

THE prisoners were accordingly tried on the indictment, and upon evidence that the entry into the house must have been after it was dark, they were convicted.

THE KING *against* JAMES KNEWLAND AND NATHANIEL WOOD.

CASE CCXCII.

AT the Old Bailey in January Session 1796, *James Knewland* and *Nathaniel Wood* were tried before MR. JUSTICE HEATH, on an indictment which charged them with having feloniously made an assault, in the dwelling-house of the said *James Knewland*, upon *Sarah Wilson*, on the 5th January, and put her in fear, and taken from her person and against her will *one shilling*, her property.

To obtain money by a threat to send for a constable, and take the party before a magistrate, and from thence to prison, is not ROBBERY; for the threat of legal imprisonment ought not so to alarm any mind as to induce the person to part with his property. S. C. 2 East, 732.

THE EVIDENCE.—The prisoner *Knewland* was the master and conductor of a mock auction, which he had long carried on, to the great detriment of the innocent and unwary, at a shop near Temple Bar; and the other prisoner, *Nathaniel Wood*, was his coadjutor in the business. The prosecutrix, *Sarah Wilson*, was a young woman just arrived from the country, and then living with her relations in *Milford-lane*, near *Essex-street*, in the *Strand*. Returning home from *Holborn*, on the 5th January 1796, she was stopped, as she was passing along, by *Nathaniel Wood*, who was standing at the door of the auction-room, and solicited, in the usual terms of such characters, to walk in. She accordingly stepped over the threshold of the door, and was immediately hustled along by *Wood* to the table, where *Knewland*, in the character of auctioneer, with the hammer in his hand, was selling or pretending to sell some knives and forks that lay on the table.

1796. The biddings were then mentioned to be fourteen shillings. There were at this time near twenty persons standing round the table, one of whom, a young man, came forwards to *Sarah Wilson*, and offered her a knife and fork to look at. She refused to take them, saying it was an article she had no occasion for, and therefore should not be a purchaser of them; upon which the young man, in the hearing of *Knewland*, immediately replied, "You must bid before you can obtain your liberty again." She, however, refused to bid any thing, and said, loud enough for *Knewland* to hear, that she should not have come into the shop if she had not been forced in by the man at the door. An elderly gentleman stood on her right-hand: the young man still pressed her to bid, saying, "Pray, ma'am, make haste, you detain the company; that gentleman who is next to you," pointing to the elderly gentleman on her right-hand, "will bid after you." The girl, alarmed by these importunities, attempted to leave the shop, but she was immediately surrounded and hemmed in by the company; and being still pressed to bid something, and conceiving that she could not gain her liberty without complying, at length bid *sixpence* more, and *Knewland* knocked the lot down to her directly at fourteen shillings and six-pence, and declared that she was the buyer. The poor girl, terrified on finding what place she had got into, immediately attempted to push through the crowd, and make her escape; but *Knewland* laid hold of her, stopped her, and told her, that as she had bought the lot of knives and forks, she must pay for them. The front door of the shop, which until this time had been open, was now shut. The girl told *Knewland* that she had been forced in, and obliged to bid, but that she had no intention to buy the article; for that she was a poor servant out of place, and had no occasion either for knives or forks, neither had she so much money in her pocket, nor could she tell where to get it, and therefore begged and prayed of him to let her go. *Knewland*, however, insisted on having the money; and told her, that if she had not all the money, she must pay half a guinea in part, and leave the bundle which she then had on her arm until

KNEWLAND'S AND WOOD'S CASE.

1796.

KNEWLAND AND WOOD'S CASE.

she could raise the remainder. On the girl refusing to comply with this proposal, *Knewland* said to her, "Then you shall go to *Bow-street*, and from thence to *Newgate*; and be there imprisoned until you can raise the money," and he ordered the door to be guarded, and a constable to be sent for to take her to prison. The prisoner, *Nathaniel Wood*, almost instantly came into the shop, attended by a man in the character of a constable; when *Knewland*, who all the time had kept one hand fastened on the girl's shoulder, and the other on her bundle, gave her a shove towards them, saying, "Now here is the constable; lay hold of her constable, and take her to prison; take her to *Bow-street*, and from thence to *Newgate*." The pretended constable, addressing himself to the girl, said he must be paid for his trouble; that he had other business to do, and must not be detained. The girl, terrified at the idea of being taken into custody, represented to the constable the poverty of her situation; that she had no money, nor any friends to whom she could apply for any. The pretended constable replied, "Unless you will give me a shilling, you must go with me." During this conversation, *Knewland* had again laid hold of the girl's shoulder with one hand, and her bundle with the other; and while he thus held her, she put her hand into her pocket, took out *a shilling*, and gave it to the pretended constable, who said, "If *Knewland* has a mind to release you it is well, for I have nothing more to do with you;" and, on the door being opened to let out the constable, she was suffered to escape. She declared on oath, that she was in *bodily fear of going to prison*, and that under that fear she parted with *the shilling* to the constable as a means of obtaining her liberty; but that she was not impressed with any fear by *Knewland* laying hold of her shoulder with one hand and her bundle with the other; for that she only parted with her money to avoid being carried to *Bow-street*, and from thence to *Newgate*, and not out of fear or apprehension of any other personal force or violence.

KNOWLYS and CONST, *for the prisoners*, submitted to the Court, that the evidence, supposing the whole of it to be

1796.

KNEWLAND AND WOOD'S CASE.

true, did not prove the prisoners, or either of them, guilty either of *robbery* or of *larceny*, according to the true and legal definitions of those offences. The allegations in the indictment are, "that the prisoners, *James Knewland* and *Nathaniel Wood*, did with force and arms, in the dwelling-house of the said *James Knewland*, feloniously, in and upon *Sarah Wilson*, make an assault, putting her, the said *Sarah*, in corporal fear and danger of her life, and one shilling, the monies of the said *Sarah*, did violently steal, take, and carry away, &c." And First, as to the allegation of robbery, the evidence, instead of proving a robbery, absolutely negatives the charge. Robbery is defined uniformly, by all the writers upon Crown Law, to be "a felonious and violent taking of any money or goods from the person of another, putting him in fear." All violence includes the idea of force; and the force used must, to constitute this crime, be so great as to raise, constructively, in the mind of the party, a fear or apprehension of such personal danger as may by possibility affect his life. To this general rule, indeed, modern decisions have added one exception; but in every other instance, where it has been necessary to investigate the nature of this offence, this rule of construction has been invariably pursued. The exception alluded to is the case of a person obtaining property from another by threatening to accuse him of a crime too horrid almost to mention; and it is neither to be wondered at nor lamented, that such a case should become an exception to the rule; for certain it is, that the dread of such an accusation must strongly operate on the firmest mind, and create a fear much greater than any that can be excited by the apprehension of personal violence. It conveys an imputation at which the boldest mind, however conscious it may be of innocence, immediately startles and shrinks back; the violence of its effect is irresistible; and it excites a fear much greater than the idea of any personal injury or loss of property, under other circumstances, can possibly create. In the present case no actual violence was used; and the only pretence of fear arose from the idea of impending imprisonment, which is a species of fear that never was, or can be.

See Donally's Case, 2 East's P. C. 715.

Ante, p. 193. Case 97.

1796.

KNEWLAND AND WOOD'S CASE.

in contemplation of law, equal to that which the mind must feel from an apprehension of the loss of life, or, what is dearer than life to every good mind, character. The true meaning of the law may be well collected from the expressions uniformly used in a long course of precedents upon this particular subject. All former indictments for robbery use, like the present indictment, the expression, that the offender did put the party supposed to be robbed *in bodily fear and danger of his life*; and this allegation clearly shews the kind of fear which the law expects to be excited in order to constitute the crime of robbery; but in the present case the prosecutrix expressly denies that she felt any fear of this kind; for she declared, that she parted with her money through *bodily fear of prison*. The words "*bodily fear*," if taken without explanation, might perhaps be sufficient; but when coupled with the words "*of prison*," the sentence proves that the kind of apprehension her mind entertained was merely that of being taken into custody; for she was under no mistake or delusion, and understood completely the nature and extent of the threat which *Knewland* used, namely, that the constable should carry her to *Bow-street*, that is, before a Magistrate, and from thence, if she had been guilty of any offence, to *Newgate*. Now it cannot be imagined, except in the extreme case which has been already mentioned, that the fear of being carried before a Magistrate for the purpose of investigating a complaint, which her own mind must tell her was unfounded, or of being sent from thence to prison, which never could have happened, unless she had done something to deserve it, is that species of fear which can be considered equal to the notion of being put in bodily fear and danger of life. BRACTON says (1) that the fear necessary to constitute the crime of robbery must be of such a quality as might operate *in constantem virum*; for it is not every loose apprehension, under which a person may part with his money, that shall be considered such a fear as to put the party creating it to answer for a capital offence. It must be a vehement terror of mind, caused by the just apprehension of some grievous mischief. The conduct of the prisoners, therefore,

(1) See 2 East, 485.

1796.

KNEWLAND AND WOOD'S CASE.

may perhaps amount to a gross *conspiracy*, but can never be construed into the crime of *robbery*.—As to the SECOND QUESTION, whether, although the prisoners have not been guilty of *a robbery*, they may not be convicted of the *larceny*, it seems clear, under the circumstances of this case, that they cannot. Larceny is defined to be "a felonious taking against the will of the owner;" but here was no taking at all, if it was not a violent taking. If a force, either actual or constructive, be so far applied to a person as to oblige him to deliver his property, it is the same as if it had been actually taken out of his pocket, and will amount to the crime of robbery; but where no such force is applied as will, in contemplation of law, constitute this offence, a delivery of property by the party must be considered as a voluntary delivery; or, at any rate, a mere releasement and abdication of corporal custody, and not as the final act of dominion. It was in the present case taken violently, or not at all; and if without violence, what is there to constitute a larceny?

Ante, p. 278, Case 137.

TREBECK, *for the Crown*. In the case of *Daniel Hickman*, which is the excepted case alluded to, the TWELVE JUDGES, upon serious consideration of what they should hold out to the world to be the law of the land with respect to robbery, said, "that the true definition of robbery is the stealing or taking from *the person*, or in *the presence* (*a*) of another,

(*a*) *Staundforde*, 27. from the Case in Fitz. Cor. 115. & 178, says "that if one person take another's goods openly from any place in which the owner is *present*, and *against his will*, it is robbery, although it be not actually taken from his person: as where a carrier is driving his pack-horse, and the thief seizes the horse, or cuts his pack, and takes away the goods, or where the thief comes into the presence of *A.* and with force, and by putting *A.* in fear, drives away his horse, his cattle, or his sheep," 1 Hale P. C. 533. "or where a man-servant is robbed of his master's goods in the sight of his master; or where a person casts away his goods to save them from a robber, and the robber takes them up and carries them away," Rex *v.* Wright Stiles, 156; "or where a person asks charity of a gentleman on horseback, and on his taking out his purse gently strikes it out of his hand, and afterwards by violence, and putting him in fear, takes it in his presence from the ground," Rex *v.* Francis, 2 Stra. 1015. B. R. H. 118. Com. Rep. 478; but in this taking the goods must be under his im-

1796.

KNEWLAND AND WOOD'S CASE.

property to any amount, with such a degree of *force* or *terror* as to induce the party *unwillingly* to part with his property; and whether the terror arise from real or *expected* violence to the person, or (1) from a sense of injury to the character, the law makes no difference (2); for the principal ingredient in this offence is a person being "*forced* to part with his property against his will." Now the prosecutrix has solemnly declared, on her oath, that the money was forced from her by means of terror; and it is clear, from the circumstances of the case, that she was, at the moment she parted with it, deprived of all free agency and free will (3). But it is contended, that according to the general definition of robbery, there is only a certain species of terror that will support the allegation of *vi et armis* in the indictment, namely, that species of terror which proceeds from a well-grounded apprehension of personal injury: and what circumstances can excite such an apprehension more powerfully than those which compose this case? the prosecutrix must necessarily have conceived that the prisoners intended personal violence; they threatened to drag her from the auction-room at *Temple-Bar* to *Bow-street*, and from thence to *Newgate*; and as to the pretence of carrying her before a Magistrate, she might reasonably suppose it to be merely colourable, and might fairly apprehend a violence, the extent of which she could not foresee (4). The fear, however, it is contended, must be of that sort which is likely to fall upon a firm and constant mind; but firmness depends, in a great measure, on the state of the nerves; and the law surely cannot depend upon so precarious a system. The question is, whether the threats used in the present case were such as, generally speaking, are likely to impress the human mind

(1) See Ashley's Case, 2 East, 729.

(2) 2 East, 728.

(3) See C. J. De Grey's opinion in Donally's Case, 2 East, 725, and the opinion afterwards delivered by Willes, J. 2 East, 727.

(4) 2 East, C. L. 724, 726, 727.

mediate and personal care and protection, 1 Hawk. P. C. ch. 34. s. 6.; "for a taking in *the presence* of a person is, in construction of law, a taking from *his person*," 3 Inst. 69.; and, indeed, *Sir Edward Coke*, in his quaint stile, derives the word *robbery* from *de la robe*; "because," says he, "in ancient times robbers bereaved the true man of some of his robes or garments; and also, for that his money or other goods are taken from *his person*, that is, from or out of some part of his garment or robe about his person, and is ranked in this place, for that it concerneth not only *the goods*, but *the person* of the owner." 3 Inst. 69.

1796.

KNEWLAND AND WOOD'S CASE.

with terror; and certainly, when the whole of the transaction is considered, it is of such a nature as may be capable of exciting terror in every mind. But supposing this constructive violence not to be sufficient, a real and actual force has in this case been used. The whole was a conspiracy; and the circumstance of *Wood*'s shoving her into the shop, joined to the hustling she received from the company, and the restraint she was under by *Knewland*'s laying one of his hands on her shoulder, and the other on her bundle, at the time the constable demanded the shilling from her, form such a real violence as comes precisely within the definition of robbery as laid down in *Hickman's Case*. If there had been no threat to take her to *Bow-street*, and from thence to *Newgate*, the fact of her being shoved into the shop, and there detained until she parted with her property, is sufficient to support the allegation that the taking was *vi et armis*; and in *Donnally's Case* the Court expressed a wish to have it understood that all these cases of robbery should depend on their own particular circumstances.—But if the fear in this case is not sufficient to constitute the crime of robbery, still the prisoners may be convicted of the simple larceny, if the Jury shall be of opinion that they obtained this shilling fraudulently, with a felonious design to convert it to their own use; for if they had this intention originally, it is certainly a larceny.

Ante, p. 278, Case 137.

Ante, p. 193, Case 97. and 2 East, C. L. 727.

KNOWLYS and CONST *in reply*. If the notion were to be admitted, that money obtained contrary to the free will and consent of the party is sufficient to constitute the offence of robbery, the obtaining of money by any species of duress will be converted into a capital offence. Suppose a constable, under colour of his office, takes up a person illegally, on a false charge, for instance, and says, "Give me half a crown, and I will let you go," here the free agency of the party is destroyed; and if he give the money demanded, it is certainly extortion, but cannot be robbery (*a*). But taking the definition of robbery to be as laid down in *Hickman's Case*, the

(*a*) But see Gascoign's Case, *ante*, Old Bailey October Session 1783, page 280. Case 138. *contrà*.

1796.

KNEWLAND AND WOOD'S CASE.

present case is not within it. To constitute this offence two ingredients are necessary, either violence actually committed on, or expected to be committed on the person, or that kind of injury to the reputation that will induce any person to part with money, just as any threat of personal violence would do. Now, it is not pretended that any injury could arise to this young woman's reputation; and the only dread she was under was the dread of imprisonment: but the law has guarded with abundant caution for this event; for the moment any person is carried before a Magistrate, that very moment the Magistrate will examine into the facts, and either dismiss the prisoner, or put the matter of complaint into a mode of further investigation. The only personal fear she could entertain, was that of going before a Magistrate, and disclosing the facts of the case; but is this equal to the apprehension of personal injury? Is this equal to the fear which must be excited by putting a pistol to a man's head, and threatening him with instant death? Certainly not; for the fear of illegal imprisonment is removed in the one case by going before a Magistrate, but in the other the danger is continually impending.

MR. JUSTICE HEATH. This case is different from any former case on the subject of robbery. The cases that have been alluded to of *Rex* v. *Donnally* (1), and *Rex* v. *Hickman* (2), only go thus far—that to obtain money from a person by accusing him of that which, if proved, would carry with it an *infamous punishment*, is sufficient to support an indictment for robbery; but it has never been decided, that a mere charge of imprisonment and extortion of money, as in the present case, is sufficient. The doctrine, however, that has been laid down by the JUDGES, in giving judgment in the two cases that have been cited, is very broad. It is necessary, to be sure, in all cases, and more particularly in the administration of criminal justice, that the doctrines upon which the JUDGES have proceeded in the determination of any case, should be clear and decided: AND WE ARE ALL OF OPINION, that this is a proper case for their consideration. For this purpose it will be necessary to take the opinion of the Jury upon certain facts; for the question in this case will de-

(1) *Ante*, page 193. Case 97.

(2) *Ante*, page 278, Case 137.

1796.

KNEWLAND AND WOOD'S CASE.

pend on the finding of the Jury.—The learned Judge then directed the Jury to acquit the prisoners of robbing in the dwelling-house, as it was stated in the indictment to be *Knewland*'s house; and left them to consider, whether this was not a combination and conspiracy to obtain money by means and under pretence of a sham auction; and whether the prosecutrix gave the money from the fear of any actual violence, or only from an apprehension of being carried to *Bow-street* and from thence to *Newgate*.

THE JURY found the prisoners GUILTY; and that they had an intention, by combination, to obtain money from the prosecutrix; that she gave the shilling under the fear of being carried to *Bow-street*, and from thence to *Newgate*; and that she did not know at that time the extent of the violence that might be committed upon her.

MR. JUSTICE ASHHURST, in February Session 1796, delivered the opinion of the JUDGES as follows:—The question submitted to their consideration was, whether, taking the whole of the circumstances together, they are sufficient in law to constitute the crime of *robbery?* And after a most minute discussion of the subject, they are of opinion, that the prisoners were improperly convicted; the force and terror necessary in contemplation of law to perfect this species of crime being wanting. Terror is of two kinds; namely, a terror which leads the mind of the party to apprehend an injury to *his person*, or a terror which leads him to apprehend an injury to *his character* (*a*). The first kind of terror is that which is commonly made use of on the commission of this offence, and is always held sufficient to support an indictment of this description. But the second species of terror has never been deemed sufficient, except in the particular case of exciting it by means of insinuations against, or threats to destroy, the character of the party pillaged, by accusing him of sodomitical practices. The fears unavoidably excited by these means have, on several occasions, been determined by the JUDGES

(*a*) Or an injury to his property, as to *burn down his house*. Rex *v.* Astley, 2 East C. L. 729. Rex *v.* Simson, 2 East, 731. and Brown's Case, Old Bailey, June 1780. 2 East, 731.

1796.

KNEWLAND AND WOOD'S CASE.

to be sufficient to constitute the crime of robbery (1); but it is confined to these cases only. The bare idea of being thought addicted to so odious and detestable a crime, is of itself sufficient to deprive the injured person of all the comforts and advantages of society: a punishment more terrible, both in apprehension and reality, than even death itself. The law, therefore, considers the fear of losing character by such an imputation as equal to the fear of losing life itself, or of sustaining other personal injury. But in the present case the threat which the prisoners made was to take the prosecutrix to *Bow-street*, and from thence to *Newgate*: a species of threat which, in the opinion of the JUDGES, is not sufficient to raise such a degree of terror in the mind as to constitute the crime of robbery; for it was only a threat to put her into the hands of the law, and an innocent person need not in such a situation be apprehensive of any danger. She might have known, that having done no wrong, the law, if she had been taken to prison, would have taken her under its protection and set her free. The terror therefore arising from such a source cannot be considered of a degree sufficient to induce a person to part with his money. It is the case of a simple duress, for which the party injured may have a civil remedy by action, which could not be if the fact amounted to felony (*a*). As to the circumstances of this case, as they affect the other prisoner, *Nathaniel Wood*, it appears that the force which he used against the prosecutrix was merely that of pushing her into the sale-room, and detaining her until she gave the shilling; but as *terror* is, no less than *force*, a component part of the complex idea annexed to the term robbery, the crime cannot be complete without it. The JUDGES, therefore, are of opinion, that however the prisoners may have been guilty of *a conspi-*

(1) Rex v. Donnally, *ante*, 193. Rex v. Hickman, *ante*, 97, and Jones's Case, *ante*, p. 139. Case 75.

(*a*) See the Case of Rex v. Southerton, 6 East's Term Rep. 126—143. that threatening, by letter or otherwise, to put in motion a prosecution by a public officer to recover penalties under a penal statute for the purpose of obtaining money to stay prosecution, is not such a threat as a firm and prudent man may not be expected to resist, and therefore is not in itself an indictable offence at common law.

racy, or other misdemeanor, they cannot in any way be considered to have been guilty of the crime of robbery.

THE prisoners were detained in custody, to afford the prosecutrix an opportunity of indicting them for the misdemeanor.

1796.

CASE CCXCIII.

THE KING *against* JOHN HENRY GADE.

An indictment for forging a *transfer* of stock is good, although the stock had never been *accepted* by the person in whose name it stood, and although the transfer was not *witnessed* according to the rules and directions of the Bank.

S. C. 2 East, 874.

AT the Old Bailey February Session 1796, *John Henry Gade* was tried before MR. JUSTICE LAWRANCE for forgery, on the statute 33 Geo. III. c. 30. s. 2. which is intitled, "An Act for the better preventing forgeries and frauds in the *transfers* of the several funds transferable at THE BANK OF ENGLAND;" and, after reciting, "That for the better preventing such forgeries and frauds in future, it is necessary that further provision should be made, as well to prevent *frauds* practised by persons taking upon themselves to make transfers, &c. as to prevent *forgeries* of such transfers, &c.' ENACTS, "That if any person or persons shall falsely make, forge, or counterfeit, or procure to be falsely made, forged, or counterfeited, or shall willingly act or assist in the falsely making, forging, or counterfeiting of any *transfer* of any interest, part, or share of, or in any stock or stocks, annuity or annuities, or other funds transferable at the Bank of England, or shall utter or publish as true any such false, forged, or counterfeited transfer, as aforesaid, knowing the same to be false, forged, or counterfeited, with intent to defraud, &c. all and every person or persons whatsoever so offending shall be deemed guilty of felony, and shall suffer death as a felon or felons, without benefit of clergy."

THE indictment contained eighteen counts.—THE FIRST COUNT stated, "That one *William Harrison*, by the name and description of *William Harrison*, of *York-street*, *Southwark*, gentleman, on the 14th January, in the 36th year, &c. was *possessed of*, and *intitled unto*, a certain interest and share, TO WIT, fifty pounds interest and share of, and in certain annuities transferable at THE BANK OF ENGLAND,

1796.

GADE'S CASE.

and established by certain Acts of Parliament (that is to say, &c." (*a*) AND THE JURORS AFORESAID do further present that *John Henry Gade*, late of *London*, yeoman, well knowing the premises, but being a person of a wicked mind and disposition, and unlawfully devising and intending to defraud and deceive the Governor and Company of the Bank of England heretofore, and whilst the said *William Harrison* was so as aforesaid *possessed of*, and *intitled unto*, the said fifty pounds, interest and share of and in the said annuities, so as aforesaid transferable at the Bank of England, TO WIT, on the said 14th January, in the 36th year aforesaid, with force and arms, at *London* aforesaid, (that is to say) in the parish of, &c. feloniously did falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged and counterfeited, and willingly act and assist in the falsely making, forging, and counterfeiting A TRANSFER of the said 50*l.* interest and share of, and in, the said annuities, so as aforesaid transferable at THE BANK OF ENGLAND, with the name *William Harrison* thereunto subscribed, purporting to have been signed by the said *William Harrison*, and to be a transfer of the said 50*l.* interest and share of, and in, the said annuities so as aforesaid transferable at THE BANK OF ENGLAND from the said *William Harrison* unto one *William West*, of the Stock Exchange, gentleman, his executors, administrators, or assigns; the tenor of which said false, forged, and counterfeited transfer, is as followeth (that is to say)

(*a*) 25 Geo. II. c. 27; the 28 Geo. II. c. 15; the 29 Geo. II. c. 7; the 31 Geo. II. c. 22; the 32 Geo. II. c. 22; the 33 Geo. II. c. 12; the 1 Geo. III. c. 7; the 6 Geo. III. c. 15; the 7 Geo. III. c. 24; the 8 Geo. III. c. 18; the 10 Geo. III. c. 34; the 16 Geo. III. c. 34; the 18 Geo. III. c. 22; the 19 Geo. III. c. 18; the 22 Geo. III. c. 8; the 23 Geo. III. c. 35; the 24 Geo. III. c. 10; the 33 Geo. III. c. 28; the 34 Geo. III. c. 1; the 35 Geo. III. c. 14; and 36 Geo. III.; "An Act for the raising 18,000,000 by way of annuities."

1796.

GADE'S CASE.

" No. 20,205. Witness to the identity of *W. Harrison*, *John H. Gade*, known to *J. Unwin*. 19726 43007

I, WILLIAM HARRISON, of York-street, Southwark, Gent. this fourteenth day of January, in the year of our Lord one thousand seven hundred and ninety-six, do ASSIGN and TRANSFER fifty pounds, all my interest or share in the joint stock of three per cent. annuities, erected by an Act of Parliament of the 25th year of the reign of King George the IId. entitled, " An Act for converting " the several annuities therein mentioned, " into several joint stocks of annuities, " transferable at the Bank of England, to " be charged on the sinking fund, and by " several subsequent Acts, together with " the proportional annuity at 3*l.* per cent. " per annum attending the same," unto *William West*, Stock Exchange, Gent. his executors, administrators, or assigns,

Witness, Hand

WILLIAM HARRISON.

WITNESS,

l.	*s.*	*d.*
50		

with intent to defraud the Governor and Company of the Bank of England, against the form of the statute in such case made and provided, &c." THE SECOND COUNT was for feloniously uttering and publishing as true the said transfer. THE THIRD, FOURTH, FIFTH, and SIXTH COUNTS charged the forging and uttering with intent to defraud, 1st, *William Harrison*. 2dly, *William West*. THE SEVENTH, EIGHTH, NINTH, TENTH, ELEVENTH, and TWELFTH COUNTS were the same, *mutatis mutandis*, only charging that *William Harrison* was " *possessed of*, and *intitled unto*, a certain interest and share (to wit) fifty pounds interest and share of, and in, certain annuities transferable at THE BANK OF ENGLAND, commonly called consolidated three *per centum* annuities, &c." The remaining SIX COUNTS only charged generally, without mentioning to whom the stock belonged, and without reciting the statutes, " That *John Henry Gade* feloniously did falsely make, forge, and counterfeit, a certain transfer (TO WIT) a transfer of an interest and share; that is to say, fifty pounds interest and share of, and in, certain annuities transferable at THE BANK OF ENGLAND, commonly called *consolidated three*

1796.

GADE'S CASE.

per cent. annuities; and that he did utter and publish the same as true to defraud, 1st, *The Bank of England;* 2dly, *William Harrison;* and, 3dly, *William West.*"

THE following facts appeared in evidence.—The prisoner, a native of *Germany*, had resided in *England* near thirty years, during which time he married one of the daughters of Mr. *John Howard*, of *Woking*, in the county of *Surry*, and endeavoured to support a numerous family by carrying on the trade of a baker, in *Vere-street*, near *Clare-market;* but his profits being unequal to his expences, his deficiencies were annually supplied by his father-in-law, until his wife died, when all assistance being withdrawn from him, he became embarrassed, quitted his shop, and sought a precarious support by means not very favourable to his moral character, in an obscure part of *Southwark*, called *York-street*, in the vicinity of the *Mint*. *John Howard*, his wife's father, was possessed of 951*l.* 14*s.* 10*d.* three per cent. consols, and by his will, dated 10th October 1788, he bequeathed (among other legacies to his children and his grand-children) to his "grandson *William Harrison*, the sum of fifty pounds in the "three per cent. consolidated Bank annuities;" and made the prisoner and a Mr. *Henry Harland* his executors. The testator died soon after the making of his will; and the several legacies were transferred (*a*) to such of the legatees as were of age in the month of March 1789, and to those who were minors, as they respectively attained the ages of twenty-one years; and at the time the transfer in question was made, no other stock than the fifty pounds bequeathed to *William Harrison* was standing in the testator's name. *William Har-*

(*a*) By 33 Geo. III. c. 28. s. 14. and 35 Geo. III. c. 14. s. 16. it is provided, that all persons possessed of any share or interest in the *funds*, or any estate therein, may devise the same by will in writing *attested by two or more credible witnesses;* but that no payment shall be made upon any such devise until so much of the said will, as relates to such share, estate, or interest in the said stocks of annuities, be entered in the said office, and that in default of such transfer, or devise, such share or interest in the said stocks of annuities, shall go to the executor, administrator, successor, and assigns, &c.

1796.

GADE'S CASE.

rison, the devisee of this stock, came of age on the 16th September 1795, at which time he was a private soldier in the 90th regiment of foot, which was then serving abroad in *L'Isle de Dieu*; from whence he returned to *England* on the 11th January 1796, but he continued with his regiment at *Poole*, in *Dorsetshire*, ignorant, for any thing that appeared to the contrary, of his grandfather's death, until he was brought to town as a witness on the trial of the present indictment. On the beginning of January 1796, the prisoner applied to *Henry Harland*, the co-executor, to join him in tranferring this 50*l.* stock into the name of the devisee; and *Harland*, not suspecting that any thing improper was intended, assented to this proposal; and Mr. *John Unwin*, who had been employed in making the former transfers under Mr. *Howard*'s will, was applied to by the prisoner for this purpose. *Unwin*, with a view to describe the tranferee properly in the transfer, asked the prisoner where *William Harrison* lived, as it was necessary that a place of abode should be given to him therein; to which he replied, that *Harrison* was then at sea, and would most probably be in *England* in a few days; but that he might describe him as of *York-street*, in *Southwark*, the place in which he himself resided. Mr. *Unwin* accordingly, on the 11th of the same month, made out a transfer ticket pursuant to these directions, from which the following transfer was regularly filled up, and afterwards signed by *Harland* and *Gade*.

"No. 20, 115.
A. E. 4479.

Witness to the identity of *J. H. Gade*, *H. Harland*, Executor to *John Howard*.
J. UNWIN.

WE, *John Henry Gade* and *Henry Harland*, Executors to *John Howard*, late of *Woking*, *Surry*, Gent. deceased, this eleventh day of January, in the year of our Lord one thousand seven hundred and ninety-six, do assign and transfer fifty pounds, all his late interest and share in the joint stock of three per cent. annuities, erected by an Act of Parliament of the 25th year of the reign of King George IId, entitled, "An Act for converting the several "annuities therein mentioned, into several joint stocks of "annuities transferable at THE BANK OF ENGLAND, to be "charged on the sinking fund, and by several subsequent "Acts, together with the proportional annuity at 3*l.* per "cent. per annum attending the same," unto *William*

5 1/3 3 1/4 5 1/4 7 2/6 *Harrison*, of *York Street*, in *Southwark*, Gent. his executors, administrators, or assigns.

Witness my hand,

JOHN HENRY GADE, } Executors to *J. Howard*, deceased.
H. HARLAND. }

WITNESS, I say, *J. Howard*,
J. Suree."

I, . . . *Blank*, . . . do freely and voluntarily ACCEPT the above stock transferred to me.

THE conveyance having been thus far effected, *Gade* went, on the Thursday following, the 14th January, to Mr. *Unwin* at the Bank, and told him that the young man was returned from sea, and wished to convert his stock into cash, and that he would therefore be glad if he would find a purchaser for it, shewing him at the same time a young man who was with him, as *William Harrison*, the person to whom the stock belonged. Mr. *Unwin* accordingly sold the stock to Mr. *William West*, and wrote *a transfer note*, from which the transfer clerk made out *the transfer* as stated in the indictment. Previous however to this transfer being signed by the young man who personated *William Harrison*, Mr. *Unwin* informed the prisoner, *Gade*, that as he, *Unwin*, did not personally know *William Harrison*, the proprietor of the stock, it would be necessary that he, *Gade*, should certify *Harrison's* identity on the transfer; and accordingly when the young man had signed the name *William Harrisson* at the bottom of the transfer, *Gade* wrote his name in the margin of it, to testify that he was the identical *William Harrison* to whom the stock belonged; Mr. *Unwin* at the same time subscribing a declaration that *Gade* was known to him. The transfer clerk, on looking at the several signatures, and observing the word "*Harrisson*" was spelt with a double *ss* instead of a single *s*, as filled up in the body of the transfer, asked the young man in the hearing of *Gade*, whether he always wrote his name in that way? and on being answered in the affirmative, he told him that he must verify that fact by an affidavit *before the transfer could be completed.* On which the prisoner inquired, "where they must go to make it?" and on being informed that it might be made before the Lord Mayor, they

1796.

GADE'S CASE.

departed in seeming consternation, but never returned. This circumstance created a suspicion that *William Harrison*, the real proprietor of the stock, had been personated, and that the signature, "*William Harrison*," was a forgery; and it appeared upon further inquiry, that the young man was the prisoner's son, whom he had made instrumental for the purpose of procuring this money, but which still fortunately remained in Mr. *Unwin*'s hands until 25th January, when the prisoner was apprehended and the money paid back to Mr. *William West*, the transferree. It also appeared that inconveniencies having frequently arisen at the Bank by *acceptances* of stock not having been made in due time, the Court of Directors had ordered printed copies of the following NOTICE to be hung up in the several transfer offices.

"BANK OF ENGLAND, 12th April, 1781.

"TAKE NOTICE—That all persons to whom stock in the funds is or shall be transferred, may be convinced of the necessity of *accepting* the same, either by themselves, or by their attornies lawfully authorized, in order to make conveyance of the property *complete and legal*, the following clause in the several Acts of Parliament that prescribe the mode of transferring, is published by order of the Court of Directors held this day.

"By the statutes 33 Geo. III. c. 28. s. 14; the 35 Geo. III. c. 14. s. 16; the 36 Geo. III. c. 12. s. 16; and other statutes, it is enacted, "That books shall be constantly kept by the Accomptant General, wherein all assignments or transfers shall be entered and registered, which entry shall be conceived in proper words for that purpose, and shall be *signed by the parties making such assignments or transfers*; or, if such parties be absent, by their respective attorney or attornies thereto lawfully authorized in writing under his or their hand and seal, *to be attested by two or more credible witnesses*; and that the several persons to whom such transfers shall be made, shall respectively *underwrite their acceptance thereof*, and that no other method of assigning and transferring the said annuities, or any part thereof, or any interest therein, shall be *good or available in law*: And this further notice is given, that no proprietor of

stock in the funds, whether in separate or joint accounts, *can receive any interest, or transfer any part of the principal, till the whole principal transferred to him, her, or them has been* ACCEPTED." It also appeared that the Bank, according to the printed form of their transfers, requires that the signature of every person making a transfer should be *witnessed;* that the transfer made from the executors to *William Harrison* was witnessed accordingly; but that the transfer from *William Harrison* to *William West*, on which transfer the forgery was charged, was not *witnessed.* But it appeared, on the examination of the Clerks of the Bank, that *dividends* may be received on stock before it is accepted; that it is the duty of the clerk to see the acceptance made; that no *transfer* of stock can in general be made until it has been accepted; but that stock-jobbers are sometimes allowed to transfer without the stock being first accepted, notwithstanding the above positive orders to the contrary.

RANDAL JACKSON and BALMANNO, *for the prisoner*, took three objections; which were answered by FIELDING, KNOWLYS, and GILES, *for the Crown.*

THE Jury found the prisoner guilty; but the judgment was respited, and the case was afterwards argued before THE TWELVE JUDGES in the Exchequer Chamber by JACKSON *for the prisoner*, and GILES *for the Crown.*

JACKSON contended, First, that as *William Harrison* had never *accepted* the fifty pounds stock transferred by the executors into his name, he did not stand legally *possessed of* or *intitled unto* the same, the statute 36 Geo. III. c. 12. s. 16. and the other Stock Acts, having declared that without acceptance no *transfer* can be good or available in law. The averment in the indictment, that *William Harrison* was *possessed of* and *intitled unto* the fifty pounds stock, is a material averment, without which the indictment would not be good; and being material, it must be substantially proved. The *title* and the *possession* which it is averred that he had, must be intended to mean a legal title and a legal possession; but the legacy bequeathed to him by his grandfather, gave him

1796.

GADE'S CASE.

only an inchoate right to this property, to which he could not become legally intitled until he had procured the assent of the executors; for if there had not been sufficient assets to pay the debts of the testator, a portion of, and possibly the whole of this legacy might have been applied to that purpose; and therefore it is clear that his title was merely equitable. The assent of the executors could in this case only be signified by making a regular transfer of the property; for that is the mode which the Legislature has prescribed for this purpose, in the case of funded property; but this transfer is deficient, inasmuch as it was not *accepted* by the transferree; and all contracts require the mutual consent of the contracting parties. A regular transfer is the only mode by which the executor could confer on *William Harrison* a *legal title* to this stock, and of which he could only acquire the *legal possession* by his subsequent *acceptance* of it, according to the express direction of the Legislature, and the prescribed form of the Bank of England. Until acceptance, he is in the situation of an executor before probate obtained; for previous to that event, an executor has only an equitable interest in the property of the testator; and as the probate is the only means by which an executor can acquire a legal title to the goods of the deceased, so a regular transfer and acceptance are the only means by which he can convey a *legal title* of funded property to a legatee. The Legislature has expressly declared that no transfer shall be good, or available in law, unless the transferree shall underwrite his acceptance thereof. That has not been done in the present case; and a legal title cannot be conferred by an illegal conveyance. The entire directions of the statute must be complied with; the *acceptance* by the transferree is as essential as the *signature* of the transferror; the statute positively directs that the entry shall be *signed* by the one and *accepted* by the other, before the transfer shall be considered complete or valid. Suppose the executors had neglected *to sign* this entry, would it in that case have been a legal transfer? Certainly not; and *acceptance* by the transferree is as essential to the validity of a transfer as the signing of it is by the transferror; and of course the omission of this form-

ality must destroy its legal operation and effect. *William Harrison* could not have maintained any action against the Bank for non-payment of a dividend on this stock; for the Directors of the Bank, pursuing the powers given to them by the Legislature for that purpose, have made *the acceptance* a condition precedent not only to the reception of any dividend, but to the transfer of the principal stock; and the negligence of the Bank clerks in sometimes permitting stock to be sold, and dividends to be received, although the stock has not been accepted, cannot alter the case. The practice of the clerks cannot controul the law of the land; and the law has, for the security of stock-holders, declared that no transfer shall be good, unless, in the language of the Legislature, "the several persons to whom such transfer shall be made, shall respectively *underwrite their acceptance thereof;* AND THAT no other method of assigning and transferring stock, or any interest therein, shall be good or available in law." And this introduces THE SECOND OBJECTION, *viz.* that as *William Harrison* was not legally *possessed of*, or *intitled unto* this stock, he had no power of transferring it to *William West*, or to any other purchaser; and therefore, the attempt to transfer stock, incapable of being transferred, cannot be the subject of a capital offence, inasmuch as it was utterly incapable of working any injury. *Sir William Blackstone* (1) describes FORGERY to be "the fraudulent making or alteration of a writing, to *the prejudice of another man's right;*" but the writing in the present case, from the imperfections it laboured under, was incapable of being made instrumental to the prejudice of any man. The incapacity of *William Harrison* to transfer this stock is apparent on the face of the entry itself in the Bank books; and if any purchaser had used the due and proper caution which the law requires, and had inspected this entry, he would have seen that it was a dead letter, and that *Harrison* was not thereby legally possessed of, or intitled to this stock. The law proclaimed in such direct and positive terms by this statute, was made to prevent the fraud attempted to be practised upon the present occasion, by making it impossible to commit it, except by

(1) 4 Comm. 248.

1796.

GADE'S CASE.

forging *the acceptance.* This shews the highly beneficial object of the Act, and also that no man with his eyes open can be imposed on by an unaccepted transfer. But this case has been decided in the case *Rex* v. *Moffatt*(1); where it was determined, that "a bill of exchange, drawn for less than the *sum*, and not in the *form* required by the statute 17 Geo. III. c. 30. cannot be the subject of a capital forgery, and in which it was said, by all the Judges, "that had the bill of exchange been real, it would not (from the want of the forms stated in that case) have been valid or negotiable; and therefore the forging of it was not a capital offence." So also in the case of *Rex* v. *Lyon* (2), for forging a certain *receipt* for money, purporting to be what is called a *scrip receipt*, the indictment was demurred to, on the ground that the instrument forged was neither a *receipt* or *acquittance*, inasmuch as it was notfilled up with the name of the subscriber, or person from whom the money was received; and on that occasion, the Court, in giving judgment for the demurrer, said, that those receipts ought to be filled up with the names of the subscribers; that then, and not till then, they became receipts; that if any one take a blank without his name being inserted he has no reason to complain of it as a fraud, because if he had looked and read, he must have seen that it was no more than waste paper; and that it is no more a receipt than if, instead of omitting the name of the person supposed to pay the money, he had omitted the sum paid. So in the present case, the Act enjoins *a written acceptation* of the transfer by the transferree, without which, it says, the same shall not be *good, or available in law*, that is, it shall not be a *transfer*. This legislative injunction is repeated and enforced, as was shewn in evidence, by the orders of the Bank, printed and posted up in its offices; so that, without a violation of the law, and of the standing orders of the Bank, this supposed transfer could yield no dividend; it could sustain no action; it remained inoperative upon the Bank books; and, being incapable of working any injury, it could, of course, constitute no crime: and if this entry from the executors to *William Harrison* formed no transfer of the stock, or, at least, no such transfer as was

(1) *Ante*, page 451. Case 200.

(2) *Ante*, page 597. Case 267.

1796.

GADE'S CASE.

capable of giving to him a legal right to convey it to another person, then I contend, on the THIRD OBJECTION, that if the instrument of conveyance from the executors to *Harrison* was no *transfer*, still less was that from *Harrison* to *West*; for the latter not only wanted *the acceptance*, but *the witnessing* likewise. The former is enjoined, as before observed, by the Act; the latter by orders of the Bank, founded upon that Act, which directs transfers to be "conceived in *proper words* "for that purpose." The witnessing has been determined, as appeared by the orders of the Bank, to be a part of those proper words; it was proved that no laxity of the officers ever dispensed with witnessing; without this form it was admitted to be absolutely impossible for *West* (the transferree of the latter supposed transfer when the prisoner attempted to sell the stock), to have either re-transferred it, or received the dividend. If it should be said that the prisoner had done his part towards the accomplishment of the crime, it may be answered, that there cannot be a proportion of nothing. The same might have been urged in *Moffatt*'s and *Lyon*'s case; there could be no doubt of their intention; but in both those cases, as in this, when the prisoners had done all they thought proper, still the forged instruments were not what they purported to be upon the face of their respective indictments, namely, a *Bill of Exchange* in one case, and a *Receipt* in the other: Neither is this a transfer. Suppose the prisoner had forged a name to a blank bond, without the name of the obligee, or sum, would that be forging a bond? If the Act had contemplated the *endeavouring* to forge or counterfeit the transfer of stock (which is all that the evidence amounts to), it would have so provided, as it does in the 31 Geo. II. c. 22. for preventing the personating of stock-holders in order to receive their dividends, &c.; and upon which Act a person was convicted for *endeavouring* to obtain a dividend: but the Legislature has, in the present case, interposed a check of a different nature, namely, that stock shall not be valid in the hands of a purchaser, unless it stands in the Bank books, completed by certain formalities, enjoined by the Act for the purpose of leading to instant discovery in cases of attempts

See Francis Parr's Case, *ante*, page 434. Case 201.

1796. GADE'S CASE.

to defraud. But even if this latter transfer had been completed in point of form, it never could have availed as a transfer good in law, the first transfer being, as shewed under the two former objections, null and void in itself.

GILES *for the Crown.* The offence with which the prisoner stands charged on this indictment, under the statute 33 Geo. II. c. 30. s. 2. consists in the forging of any transfer of any interest or share in any stock transferrable at the Bank of England. I admit that it is incumbent on the prosecutor to shew that the prisoner did forge, or assist in forging, an instrument which, upon the face of it, would, if real, be such a transfer as is described in the indictment, and that he did this with intention to defraud; and I contend that the transfer set forth in the indictment, and proved by the evidence, is such an instrument. But it is said that this instrument, if real, though it might appear on the face of it to be good, would not be a valid transfer, because *William Harrison* was not in fact *possessed of* any such interest, and therefore could not transfer it. Whether he was or was not possessed of the stock, will depend upon the construction of the clause in the statute 36 Geo. III. c. 12. s. 16. and other Stock Acts, for regulating transfers. But before I proceed to shew that *William Harrison* was possessed of this stock, it may be necessary to consider whether the allegation in the indictment, "that "he was possessed of, and intitled unto a certain interest or "share, &c." is essential to the support of this prosecution. Now I take it, that in all prosecutions for forgery, if the instrument charged to be forged is such that it would, if real, be upon the face of it valid, the prisoner cannot protect himself by shewing that, from extrinsic circumstances, it could have no operation. In the case of *Rex* v. *Moffatt* (1), the bill was upon the face of it, illegal, and contrary to the statutes 15 Geo. III. c. 51. and 17 Geo. III. c. 30. inasmuch as it did not mention the place of abode of the payee. So in the case of *Rex* v. *William Jones* (2), the note not being signed, could not, on the face of it, be a valid note: So in *Rex* v. *Clinch* (3) the order for goods not being directed to any one, was not, upon the face of it, an order upon any

(1) *Ante*, page 451. Case 300.

(2) *Ante*, page 204. Case 103.

(3) *Ante*, page 540. Case 244.

person; and in the late case of *Rex* v. *Lyon* (1) the instrument was held not to be a receipt for money, because the place in which the name of the original subscriber should have been inserted was left blank; and it did not, upon the face of it, appear from whom the money had been received. But where the instrument appears, upon the face of it, to be valid, it is no defence to shew, by other circumstances, that it could not have any legal existence. Thus in the case of *Rex* v. *Sterling* (2), an instrument which, upon the face of it, appeared to be the last will and testament of *Mary Shuter*, was determined to be an instrument, the forging of which would subject the offender to a capital offence, although the supposed testatrix was still living. The law of this case was confirmed in the case of *Rex* v. *Coogan* (3), in which several cases are cited to the like effect, which shew that an instrument may be the subject of forgery, although in fact it should appear impossible for such an instrument forged to exist, provided it purports, on the face of it, to be good and valid as to the purposes for which it was intended to be made, *Rex* v. *Lockett* (4), *Rex* v. *Bolland* (5), *Rex* v. *Anne Lewis* (6), and *Rex* v. *Elizabeth Dunn* (7). So in the present case, if the transfer, upon the face of it, be good, the circumstance of *William Harrison* not being in a situation to make it, will no more form a defence than it did in the case of *Rex* v. *Lockett*, to say that *Vennist* was a fictitious person, and had no money at the Bank; or in the cases of *Rex* v. *Sterling*, and *Rex* v. *Coogan*, to say that the supposed testators were not dead. But, admitting that it is necessary for the prosecutor to shew that *William Harrison* was intitled to this stock, and so possessed of it that he could have effectually transferred it, the Court will certainly construe the section in the 36 Geo. III. c. 12. which relates to this point, in such a manner as not to disturb the interests of the stockholder, which it was expressly passed to protect. It is not a penal statute; it relates merely to civil rights; and therefore does not call for a strict construction, but for such a construction as is most likely to prevent the mischief it was designed to suppress. In conveying stock from one person to another, a transfer must be made by the proprietor before it

(1) *Ante*, page 597. Case 267.

(2) *Ante*, page 99. Case 57.

(3) *Ante*, page 499. Case 209.

(4) *Ante*, page 94. Case 53.

(5) *Ante*, page 83. Case 47.

(6) Foster, 116. *ante*, 451.

(7) *Ante*, page 57. Case 32.

1796. GALE'S CASE.

can be accepted by the transferree, and by the very act of transfer the proprietor parts with all and every part of his interest therein irrevocably; the whole property is thereby completely vested in the grantee; and the acceptance does not form any part of the conveyance. The words of the statute are merely directory, and for the security of the Bank, and do not affect the rights of the parties. The stock is, before acceptance, placed in the name of the grantee, and he may not only receive dividends thereon, but transfer it to any other person without accepting it, unless the Bank, for its own security, make the objection. If they do not, but waive their right to demand acceptance, the grantor is bound by his transfer, and in fact, by such transfer, he virtually accepts the stock, by exercising such an act of ownership over it. The transferror could not, after transfer, bring any action against the Bank for a subsequent dividend, or compel them to retransfer the stock; but he might maintain an action against the transferree for its value, although he should refuse to accept it, for the property is completely conveyed by the transfer. The executors, therefore, by the mere transfer of the stock to *William Harrison* gave him the legal possession of it, and if he had signed the transfer to *William West*, it would have completely divested him of all property in the stock. The instrument forged, therefore, is not only valid upon the face of it, but, if it had been real, would have had the full operation of a transfer, and conveyed this stock to the transferree. It is however contended, that it would not, under such circumstances, have been valid, because it was not *witnessed* according to the printed form of the transfer used at the Bank; and, therefore, ought not to have been received in evidence as *a transfer:* But the statute 36 Geo. III. c. 12. does not point out or prescribe any particular form in which transfers shall be made out; it only says, "that books shall be kept in "which all transfers of stock shall be entered and registered, "and that the entry shall be conceived in proper words for "that purpose, and be signed by the parties making the "transfer," and does not make the act of witnessing essential to the validity of the transfer; *witnessing*, therefore, cannot

make any part of the transfer. The *transfer* is complete the moment the entry is signed by the party making the transfer; the witnessing is only intended to testify its completion; and as the crime charged in this indictment is committed the moment *a transfer* is made, the mere omission to testify its completion cannot affect its validity, or be considered to render it incomplete.

MR. JUSTICE BULLER, in June Session 1796, delivered the opinion of the JUDGES to the following effect.—On the trial of this indictment, it was objected for the prisoner, that as 33 Geo. III. c. 28. s. 14. requires, "That books shall be kept at the Bank for entering all transfers, which shall be conceived in proper words for that purpose, and signed by the parties making such transfers, and that the several persons to whom such transfers shall be made shall underwrite their acceptance thereof, and no other method of assigning or transferring the said annuities shall be good or available in law," the evidence did not support the indictment. FIRST, for want of the acceptance of *William Harrison* of the transfer made to him by the executors of *John Howard*; because, until that time, the transfer was incomplete, and *Harrison* was not possessed of the fifty pounds stock. SECONDLY, because till the stock was *accepted* no transfer at all could be made. And THIRDLY, because the instrument given in evidence as a good transfer, in the name of *William Harrison*, was not *witnessed*; for, that witnessing being part of the words in which transfers were conceived, the instrument was not available in law, and therefore no transfer. These objections have been argued in the Exchequer Chamber. On the FIRST OBJECTION it was contended, that as the stock had not been accepted by *William Harrison*, he was not legally possessed of it, and that of course he was incapable of transferring it to any other person; but to this objection two answers were given, FIRST, that the stock vested in *William Harrison* by the mere act of *transferring* it into his name, and that if he had died before he had accepted it, yet it would have gone to his executors as part of his personal estate; SECONDLY, that the nature of

1796.

GADE'S CASE.

this offence would not have been altered if *William Harrison* had not had any stock standing in his name, for the transfer forged by the prisoner is complete on the face of it, and imports that there is such a description of stock capable of being transferred; the attempt, indeed, if *Harrison* had really had no stock, would have been more daring and impudent, but neither the forgery nor the fraud would have been less complete.—As to THE SECOND OBJECTION, *viz.* that the signing of the entry in the books of the Bank did not constitute *a transfer* until it was witnessed, the JUDGES are all of opinion, that the entry and signatures, as stated in the indictment, is a complete *transfer* without such attestation; for that the attestation is no part of the instrument, and is only required, *ex abundanti cautelâ*, by the direction of the Bank for their own protection. The Bank have ordered that the number of every Bank-note shall be put at each end of it, but if the number be put at one end only it is no doubt a good Bank-note, notwithstanding such omission, and the falsely making of a note in such a form would certainly be forgery. The case of *Rex* v. *Moffatt* (1), bears no resemblance to the present case; that was the case of a bill of exchange for a sum under five pounds, and upon the face of the paper it appeared to every person who saw it that it was not a bill of exchange, but was absolutely null and void; but here the transfer on the face of it is complete, and no person who looks at it can collect from it, that if it had been genuine, it would not have been a complete transfer of the stock. For these reasons all the JUDGES are of opinion that the conviction is proper.

(1) *Ante*, page 431. Case 200.

THE prisoner therefore received Judgment of Death, and was executed accordingly.

1796.

THE KING *against* MICHAEL ROBINSON.

CASE CCXCIV.

AT the Old Bailey in February Session 1796, *Michael Robinson* was tried before MR. JUSTICE LAWRANCE, on an indictment stating, "That he *Michael Robinson*, late of *London*, gentleman, otherwise called *Michael Massey Robinson*, &c. being an ill-designing, disorderly, and ill-disposed person, &c. &c. on the twelfth day of January, in the thirty-sixth year, &c. with force and arms, at the parish of *St. Andrew, Holborn*, in the ward of *Farringdon without*, in *London* aforesaid, knowingly, unlawfully, maliciously, wickedly, and feloniously did *send* a certain letter in writing, bearing date the said 12th day of January, in the 36th year, &c. *without any name subscribed or signed thereto*, to *James Oldham Oldham*, Esquire, and directed to the said *James Oldham Oldham*, by the name and description of *J. O. Oldham, Esq.* Brook-street, Holborn, therein and thereby, then and there demanding of, and from, the said *James Oldham Oldham* a certain *valuable thing*, that is to say, A BANK-NOTE, *to wit*, at the parish, &c. and which said letter so sent as aforesaid, and containing such *demand* as aforesaid, afterwards, TO WIT, on the said 12th January, in the 36th year, &c. at the parish, &c. came into the hands of the said *James Oldham Oldham* by such sending as aforesaid, THE TENOR of which said letter is as follows, that is to say— (*a*).

"SIR,

"I AM well pleased to find that I am not likely to be mistaken in the idea I have entertained of you amongst men of a proper and liberal way of thinking: an understanding on such a matter as this is the easiest thing imaginable; and, in repeating that you will find me a gentleman, I wish you to be satisfied that I am as incapable of taking any unmanly advantage, as of wantonly sporting with the feelings of any one.

The statute 9 Geo. I. c. 22. respecting threatening letters, is not repealed by the statute 30 Geo. II. c. 24. upon the same subject.

A *Bank-note* is a valuable thing within the meaning of these statutes; and is sufficiently *demanded* by signifying an intention to impute the crime of murder to the party from whom it is attempted to be obtained.

A letter signed by two initials, as R. R. is a letter *without a name* subscribed thereto, within the meaning of the Black Act.

S. C. 2 East, 1110.

(*a*) That the letter on which the prosecution is founded must be set out in the indictment, see Lloyd's Case, Hertford Assizes, 1767. 2 East's P. C. 1124.

1796.

ROBINSON'S CASE.

I have ever despised and execrated the cowardly assassin, who, skulking in obscurity, sends forth his malignant shafts to wound the peace and the character of individuals, and I have therefore uniformly resisted every overture that has been made me for such a purpose. My situation as a literary character has teemed with temptations, but a sacred principle of honour has superseded them all. The subject on which I have addressed you has long lain dormant, and it was because I thought the attack of a most serious complexion, that I hesitated for such a length of time in giving any countenance to it. Not that I ever sought for any circumstance to influence my judgment or qualify my opinion; and for all that has ever come to my knowledge, it may be all *the moonshine of the moment.* I am therefore so far candid, and, I trust, not indelicate, and it will at least be a satisfaction to you to be told, with a solemnity becoming the character I have professed myself, that not a soul but myself is in possession of a line of the MS. (meaning a certain manuscript pretended by the said *Michael Robinson*, &c. to be then in the possession of him the said *Michael Robinson*, &c.) nor has it ever been out of my hands, or perused or heard by any person living, since first I had it; so that when it is committed to the flames, ALL will necessarily die with it. Of this you shall have a testimony so clear and unequivocal, that it will not be possible for you afterwards to doubt. Thus much I have suggested for your satisfaction. You will now give me leave to say something on behalf of THE CAUSE I have engaged in. I have not the least objection to an interview, and I readily close with your proposition; but there are a few preliminaries which I must first beg leave to adjust. Perhaps I may be more anxious to urge them, in order to have some proof of your sincerity; after which I am at your service. In order to relieve a destitute and unhappy family, struggling with sickness and sorrow, you will permit me to be your almoner. Will you enable me to dispose of a little of your money, as I shall see occasion. It is a duty I owe to the cause of humanity to urge it. Remember, sir, I am now only making my appeal to your *benevolence.* I am holding out no delusions to

1796.

ROBINSON'S CASE.

exact the involuntary tribute. I am asking you as a gentleman, as a man, to give me some earnest of your intention to prove what I am so strongly inclined to give you credit for. Inclose a BANK-NOTE in a letter addressed to R. R. and let it be left at *the Cambridge Coffee-house*, the top of *Newman-street*, in *Goodge-street*, on the side of the bar. At the entrance of the Coffee-room is a bracket for letters; let it be placed there between the hours of *eleven* and *one* on Thursday next, and at five o'clock *on the same day* a line shall be sent by a porter to your house to acknowledge the receipt; after which if you will name any day (Friday excepted) in the following week, on which it will suit you in the evening to take a bottle of wine at the King's-head Tavern in Middle-row, Holborn, or elsewhere, I will with pleasure attend you. Our meeting, however, is to be private and *tête-à-tête*: Thus, possibly, over the ashes of the MS. (meaning thereby a certain manuscript, pretended by the said *Michael Robinson*, &c. to be then in the possession of him the said *Michael Robinson*, &c.) a phœnix may arise that may prove the forerunner to friendship—I shall send to the Coffee-house between the hours of *one* and *four*; and I will venture to say, that you will have no reason to be dissatisfied with the event of this correspondence. To obtain confidence, it is necessary, or, at least, reasonable to expect that one should be reposed. I have the honour to remain,

" Sir,

" Your obedient humble servant,

" Tuesday, 12th January, 1796. " R. R."

" J. O. OLDHAM, ESQ.

" Brook-street,

(Private) " Holborn."

against the form of the statute in such case made and provided, and against the King's peace, his crown and dignity."

THE prosecutor, *James Oldham Oldham*, served his apprenticeship to a Mr. *Daniel Dolly*, a stove-grate manufacturer at the corner of *Brook-street* in *Holborn*, and in the year 1772 was admitted to a share in the business. About three years after the commencement of this partnership, Mr.

1796.

ROBINSON'S CASE.

Dolly, whose health had for several years been in a declining state, was seized with a severe illness and died. A rumour immediately prevailed upon this subject to the prejudice of Mr. *Oldham*'s character; but the report being traced to its author, Mr. *Oldham* commenced an action and obtained a judgment against him, on which, after it had been vexatiously carried by writ of error to the House of Lords, he recovered damages to the extent of five hundred pounds. The death of Mr. *Dolly* left Mr. *Oldham* sole proprietor of the manufactory, and in about twelve or fourteen months afterwards he married the widow. This circumstance again gave birth to various calumnies, but none of them reached the ear of Mr. *Oldham*, and he continued from that time, including a period of more than two and twenty years, in the unmolested enjoyment of his fortune, his character, and his business until the 7th January 1796, when he received by the penny-post a letter inclosing a paper in the form of a frontispiece to a book: it had a broad black margin all round it, and purported that "On the Saturday following would be "published, a Dismal Etching of Old Ham new Dressed; "or, Dolly's Ghost cooking up a Black Desert," with two mottos, one, "*Out damned spot!*" the other, "*I could a tale* "*unfold!*" It also contained a few pages of the supposed manuscript in verse, from the words of which the charge alluded to was to be plainly inferred, together with other gross and scandalous allusions upon the subject. The letter was signed R. R. dated on the preceding day, and addressed "*J. O.* "*Oldham, Esq. corner of Brook-street, Holborn;*" and signified by its contents that the piece, to which the inclosed paper referred, had been put into the hands of the writer many months before by a prisoner in THE FLEET, who was of himself incapable of ushering it into the world; that he, the writer of the letter, had hesitated at promoting so serious an attack and taken time to consider of it; that the death of the author, soon afterwards, had occasioned *the manuscript* to be mislaid; but that having been repeatedly called upon by the widow of the deceased to make some use of it, as a means of procuring support for herself and four destitute children, he

1796.

ROBINSON'S CASE.

had thought it advisable to take this step first, supposing, from what he understood of Mr. *Oldham*'s character, as a liberal and open-hearted gentleman, that he would sooner administer to the necessities of a forlorn and helpless family, than urge any one else, as their friend, to the publication of such a work for their relief. The letter then solicited him to peruse *the manuscript* to convince himself that the author had, by some means, got possession of circumstances *important* in their nature; and requesting him to insert a line in *the Daily Advertiser* of the *Monday* or *Tuesday* following, indicating his disposition on this business, addressed to R. R. and couched in such terms as to be *properly understood*, within *eight days*, or the matter would be permitted to take its course. Mr. *Oldham*, in consequence of receiving this letter, inserted, by the advice of his friends, in the Daily Advertiser of the ensuing morning, an advertisement addressed to Mr. R. R. proposing a personal interview, in order that a production of the manuscript and an explanation of R. R.'s wishes might tend to a better understanding between the parties; and requesting that he would fix a time and place of meeting before the ensuing Friday; which advertisement produced *the letter stated in the indictment*. But, the more effectually to detect the writer of it, an answer, dated 14th January 1796, was sent, professing a total ignorance of all the matters to which the supposed manuscript was said to allude, expressing an anxious disposition to see it; excusing the omission to send the requested Bank-note; and requesting a personal and confidential interview at *the King's Head Tavern* in *Middle-row*, *Holborn*, or at any other house R. R. should appoint. This letter, which had no signature, was directed, "To Mr. R. R. to be left at *the Cambridge Coffee-house*, top of *Newman-street* in *Goodge-street*," and in an hour after it had been delivered, Mr. *Oldham* received an answer to it, signed R. R. dated from *the Grecian Coffee-house*; to which Mr. *Oldham* replied, and received an answer, containing a transcript from the pretended MS. of twenty stanzas of not inelegant poetry, alluding in very powerful and pointed expressions to the imputed circumstances of Mr. *Dolly*'s

1796.

ROBINSON'S CASE.

death. The friends of Mr. *Oldham* being of opinion that the offence was now complete, the next step to be taken was to detect the offender; for which purpose, an answer to this fourth letter was sent, directed to Mr. R. R. to be left at the bar of *the Cambridge Coffee-house*, and a Police Officer stationed in the Coffee-room to apprehend the person who should come for it; and on Wednesday the 20th January, the prisoner was, by this contrivance, apprehended in the very act of perusing this answer, which he had taken from the bracket at the corner of the bar, where it had been put by the waiter when delivered to him by Mr. *Oldham*'s servant. The prisoner, on being taken into custody, pretended that he had acted in the business merely as the agent of a Mr. *Robert Read*, and he produced a note under that signature, dated "Wednesday morning," and directed "To Mr. *Robinson*, "attorney at law, Furnival's Inn," desiring him in his way to *Queen Ann-street, East*, on the morrow, to look in at *the Cambridge Coffee-house* and get a letter there addressed to R. R.; but the post-mark on this letter was so far back as the 13th January, and he refused to give any account who *Robert Read* was, or where such a person was to be found. It also appeared, that Mr. *Robinson* did not at this time live in *Furnival's Inn*, but had for many months before resided in a court adjoining to Mr. *Oldham*'s manufactory; and that all *the letters signed R. R.* together with *the frontispiece* of the projected publication and *the copy of verses*, as extracted from the manuscript, were in the prisoner's hand-writing.

THE statute 9 Geo. I. c. 22. enacts, "That if any person or persons shall knowingly *send* any letter *without any name subscribed thereto*, or signed with a fictitious name or names, demanding money, venison, or other *valuable thing*, such offender shall suffer death without benefit of clergy."

IT was submitted, among other objections in favour of the prisoner, that the *sending* of the letter, which the statute peremptorily requires, and which the indictment charges as a substantive part of the offence, had not been proved (*a*);

(*a*) See Lloyd's Case, Hertford Spring Assizes 1767, before MR. JUSTICE YEATES, 2 East's P. C. 1122.

1796.

ROBINSON'S CASE.

that it had only been proved that these letters were in the hand-writing of the prisoner, and that he *received* the answer to the fourth letter, but it did not necessarily follow that he was the person who had *sent* to the prosecutor the letter stated in the indictment; that the fact could not be certainly inferred from the circumstances of the case; and that as *the sending* was a substantive allegation, it ought to be directly and positively proved; and he cited *Hammond's Case* (1), where two prisoners were indicted for sending a threatening letter to one *Daniel Dancer*, demanding the sum of ten pounds; the letter was proved to have been *written* by one of the prisoners, and accidentally found and *delivered* to the prosecutor by the other prisoner; and on an objection, that the letter had not been in any way whatever *sent* to the prosecutor, the Court was of opinion, that "The mere act of writing such a letter will not constitute this offence; for unless the writer, or contriver thereof, afterwards *send* it to the party, whose fears the threat it contains was calculated to alarm, it cannot possibly produce the mischief which the Legislature intended alone to suppress;" and that "in all cases so highly penal as the present case is, it is certainly necessary to bring the offender within the words of the Act of Parliament itself."

(1) *Ante*, page 444. Case 206.

But the Court was of opinion, that there was sufficient evidence upon this point for the consideration of the Jury, and it was left with them to say, First, whether the prisoner had *sent* the letter signed R. R. dated 12th January 1796, to Mr. *Oldham*; and, Secondly, whether the letter contained a threat to publish a libel on the prosecutor, imputing to him the death of *Daniel Dolly*, unless he would send him a Bank-note; and they were directed in case they were of that opinion to find him guilty.

The Jury found him Guilty, and said, that they were of opinion that he had *sent* the letter stated in the indictment to Mr. *Oldham*; and that it contained a threat to publish a libel, imputing to the prosecutor the murder of his master, to extort money.

1796.

ROBINSON'S CASE.

BUT on the other objections the judgment was respited, and the case saved for the opinion of THE TWELVE JUDGES; before whom it was argued in the Exchequer Chamber on the 8th June 1796, by RANDALL JACKSON *for the prisoner.*

THE FIRST OBJECTION is, that the letter produced in evidence was not a letter "*without any name subscribed thereto,*" as set forth in the indictment, and described in the statute 9 Geo. I. c. 22. on which the indictment is founded. A letter subscribed with *the initials of a name*, cannot be said to be a letter *without a name*; for although initials may not amount to a name, which is defined to be the discriminating appellation of an individual, yet still they amount to a designation that law, reason, and the common intercourses of life, have suffered to pass for a name; at least, in the construction of a statute so highly penal, initials used as a signature, descriptive of a person, must be considered nominal when placed in opposition to that blank which the Legislature had alone in contemplation when they used the words "without any name," and used them in contra-distinction to "a fictitious name or names." But if these initials are not to be considered as constituting a name, they amount to a designation or sign of a name, and are considered in many cases as such. Bills of exchange to an immense amount are accepted by initials, and upon bills so accepted, actions may be maintained; or, if such acceptance be forged, indictments found. In many eminent branches of business, in certain high situations, frequently in our own profession, and in many other situations and circumstances of life, the using of initials only is an indication of rank and elevation, and are frequently substituted for the name at length. It may perhaps be said, that this particular point of the case is provided for by the statute 27 Geo. II. c. 15. which enacts, "That if any person or persons shall knowingly send any letter without any name subscribed thereto, or signed with a fictitious name or names, *letter* or *letters*, threatening to kill or murder any of his Majesty's subjects, or to burn their houses, out-houses, barns, stacks of corn or grain, hay or straw (*a*), though no money,

(*a*) A letter threatening to set the prosecutor's mill on fire, and likewise

1796.

ROBINSON'S CASE.

or venison or other valuable thing shall be thereby demanded, every such offender shall suffer death without benefit of clergy." But no aid or assistance whatever can, under the circumstances of the present case, be derived from this statute. The statute 9 Geo. I. c. 22. only creates the two offences of sending a threatening letter "without any name subscribed thereto," or "with a fictitious name or names;" and to these two offences the statute 27 Geo. II. c. 15. has added a third, namely, that of sending a threatening letter "signed with letter or letters," that is, signed with fictitious letter or letters; but this last offence, with the description of which the circumstances of the present case, so far as they concern this particular point, more nearly correspond, cannot be taken notice of on this indictment, because it expressly charges the prisoner with having sent a letter "without any name subscribed thereto," and of course does not charge him with this identical and specific offence, as in the case of *Rex* v. *Girdwood* (1). Nor can it be drawn in aid from the concluding words of the indictment "*contrary to the form of the statute;*" for although these words might have been sufficient, if the 27 Geo. II. c. 15. had been merely intended to explain the order of proceeding upon the statute 9 Geo. I. c. 22. yet where, as in the present case, a statute has been continued from time to time, and received considerable additions, and is then made perpetual (*a*), such additional statutes cannot be called in aid, unless the indictment concludes in the plural number, "*against the form of the statutes.*" This law is clearly settled in the cases of *Dingley* v. *Moor*, *Cro. Eliz.*

(1) *Ante*, page 142. Case 76.

to do all the public injury the writers are able to do in all his farms and settings in his possession is not within this Act, if the prosecutor had no mill at the time, having parted with it three years before, and the words of the threat as to the farms and settings not necessarily implying a burning of them. Jepson and Springet's Case, Essex Summer Assize 1798, before KENYON, C. J. 2 East's P. C. 1115.

(*a*) The 9 Geo. I. c. 22. was originally passed for three years; but it was continued by 12 Geo. I. c. 30. for five years more, and further continued by 10, 17, & 24 Geo. II.; it was then explained and amended, with considerable additions, by the 27 Geo. II. c. 15. and at length made perpetual by the 31 Geo. II. c. 42.

1796.

ROBINSON'S CASE.

750, and *Andrews* v. *De Lewknor*, *Cro. Jac.* 187.; and of this law the prosecutors in the case of *Rex* v. *Hammond* (1) were so sensible, that they indicted him upon both the statutes of 9 Geo. I. c. 22. and 27 Geo. II. c. 15. Indeed, this latter statute is itself sufficient to shew, that a threatening letter signed with initials is not within the statute 9 Geo. I. c. 22. for it is an Act to explain and amend, as well as to add to the provisions of the 9 Geo. I. c. 22. and it makes, for the first time, a threatening letter signed with a fictitious letter or letters a capital offence, which would have been needless had it been before included in 9 Geo. I. c. 22. In the case of *Rex* v. *Girdwood* (2), the letter was signed by initials only, but the indictment did not charge, as in the present case, a letter without any name thereto subscribed, but "a certain letter in writing with the fictitious letters I. W. thereto subscribed and signed;" so that a letter thus signed with the initials of a name, was evidently considered as a distinct and separate offence from that of sending a threatening letter without any name subscribed thereto. But if even the indictment had contained a count on this statute, the prisoner could not have been an offender within it; for he has neither "threatened to kill or murder any of his Majesty's subjects, or to burn their out-houses, barns, stacks of corn or grain, hay or straw," which is the offence the statute 27 Geo. II. c. 15. describes: There is however another statute, 30 Geo. II. c. 24. which will be adverted to for another objection, and upon which alone any indictment, under the circumstances of the present case, can be founded.

(1) *Ante*, page 444. Case 206.

(2) *Ante*, page 142. Case 76.

THE SECOND OBJECTION is, that the letter does not contain either *a threat* or *a demand* within the true meaning and construction of the 9 Geo. I. c. 22. A letter, to be within the meaning of this statute, must be a threatening letter; that is, the demand it contains must be a clear and peremptory demand, accompanied with a threat or intimation of bodily harm or personal violence in case such demand is not complied with. It is laid down by Lord Chief Baron *Gilbert* (3), and by other elementary writers on the construction of statutes, that "wherever any words of a statute are obscure or

(3) 6 Bac. Abr. title "Statute."

1796.

ROBINSON'S CASE.

doubtful, the intention of the Legislature is to be resorted to in order to find out the meaning of the words; and that to discover the intention of the Legislature, there is no rule more sure than that of resorting to the preamble of the Act, which is said to be a key to open the mind of the maker as to the mischiefs that are intended to be removed, and as to the cause or necessity of passing the Act." The whole preamble of the statute 9 Geo. I. c. 22. speaks of prevailing mischiefs of the most violent and atrocious kinds; and that such mischiefs did then prevail, and were those alone which this statute was intended to remove, is clearly proved by the history of the times and circumstances under which it passed (*a*). On the 4th February 1723, a proclamation was issued offering a reward of one hundred pounds for the apprehending of persons hunting in disguise in the counties of *Berks* and *Southampton*, calling themselves BLACKS, and who, having armed and disguised their persons, had rescued offenders by open force from the constables to whose custody they had been committed by the justices, and had frequently "sent menacing letters to gentlemen, owners of parks, and to their keepers, demanding venison and money to be sent to them to certain places therein mentioned, and threatening, if they failed of performance, to murder the persons or burn the houses of those to whom such letters were sent." On the 24th April following, and in consequence of this proclamation, the bill was brought into the House of Commons, and is intitled, "An Act for the more effectual punishing wicked and ill-disposed persons going armed in disguise, and doing *injuries and violence to the persons* and properties of his Majesty's subjects." Its preamble, after stating the then predominating evils of breaking into parks, cutting down timber, robbing warrens and fish-ponds, going armed in disguise, stealing the King's deer, and other violences of the like kind, states, among the evils against which it was intended to guard,

(*a*) See a work in 3 vols. 8vo. intitled "The British Chronologist;" containing the most remarkable events from the invasion of the Romans to the accession of George the Third; and another work of a similar kind, intitled "The Historical Register."

1796.

ROBINSON'S CASE.

"that *such* persons have likewise solicited several of his Majesty's subjects, with promises of money or other rewards, to join them, and have sent letters in *fictitious names* to several persons, *demanding* venison and money, and *threatening some great violence* if such their unlawful demands should be refused." It is clear, therefore, both from the terms of the proclamation and the preamble of the Act, that the Legislature had only in view those letters which threatened to commit some great personal violence, or some outrage pregnant with danger, to *the person* of the party threatened; for although "owners of parks" are not mentioned by name in the statute, as they are in the proclamation, it is apparent from the mention of venison as well as money, that they were the description of persons whom the Legislature intended to protect. It may, however, be said, that the enacting clause of a penal statute frequently extends to mischiefs not enumerated in the preamble; but it is laid down by *Mr. Serjeant Hawkins* (1), as an incontrovertible proposition, "that where the body of a statute refers to the preamble, the words of the preamble ought to be pursued, and must controul the enacting clause;" but, in the present case, the enacting clause of the 9 Geo. I. c. 22. clearly refers to the mischiefs recited in the preamble; and the words "any letter demanding money, venison, or other valuable thing," must mean any letter threatening some great violence if their demands should not be complied with: and this appears by the case of *Rex* v. *Girdwood* (2), to be the usual mode of construing this statute. But the letter stated in the present indictment does not convey the slightest idea of intention to commit violence on the person of Mr. *Oldham*, nor did it in fact implant any fear of that kind in his mind. The contents of it amount to nothing more than a proposal to negotiate for the purchase of a manuscript reflecting on the moral character of the prosecutor, and affecting to impute to him a crime of which he was certainly not guilty; and a mere intimation of an intention to calumniate in any way the moral character of another, cannot be construed into such a threat of personal violence as will satisfy the views of the Legislature in passing this statute.

(1) 2 Hawk. P. C.

(2) *Ante*, p 142. Case 76.

1796.

ROBINSON'S CASE.

The libellous tendency of the letter excited rather a curiosity to see the manuscript, than any fear of its consequences, in the mind of Mr. *Oldham*; he had no apprehension of bodily harm from it; and the only contest was, whether the manuscript or the money was to be first produced. The threat in this case, even supposing the letter to contain one, was nothing more than to permit the publication of a libellous manuscript if the party should refuse to purchase it; and nothing can be more extravagant than to suppose, that when the Legislature were enumerating violences committed by persons hunting, in arms and in disguise, with faces blacked, and sending letters to owners of parks and their keepers, demanding money or venison, and threatening some great violence if such their unreasonable demands were not complied with, could mean to punish with death a threat or intimation from the author of a libellous poem, that unless the copy-right was purchased in a given time, he would proceed to publish it, especially when it is considered that the Legislature has expressly provided for this very offence by the statute 30 Geo. II. c. 24. as will be hereafter shewn under the fourth objection.

THE THIRD OBJECTION is, that supposing there had been a demand, the thing demanded by the letter, namely, A BANK-NOTE, is not a *valuable thing* within the meaning of the words "money, venison, or other valuable thing," in the 9 Geo. I. c. 22. It is clear from the words "money, venison, or other valuable thing," that the thing demanded must be intrinsically valuable; but a Bank-note is of no intrinsic value; its value depends upon its currency; and its currency depends upon public opinion, which in this respect fluctuates with the varying circumstances of the times. "It is by the common law," says *Sir William Blackstone* (1), "a mere *chose in action*, of no intrinsic value, and does not import any property in the possession of the person from whom it is taken; and therefore it was not at common law the subject of larceny, which requires that the property taken should be of some value." Now, indeed, the stealing of a Bank-note, or any other *chose in action*, is by the statute 2 Geo. II. c. 25. made felony; but

See now 52 Geo. III. c. 64.

(1) 4 Com. 234.

1796.

ROBINSON'S CASE.

this statute cannot have a retrospective operation so as to make a Bank-note a valuable thing, in the year 1723, when the statute of 9 Geo. I. c. 22. was passed, and indeed it has been determined that it derives its importance as a subject of criminal proceeding, entirely from the statute 2 Geo. II. c. 25. and is of no value beyond it; for in the case of *Rex* v. *Morris* (1), who was indicted for receiving Bank-notes as *property* and *chattels* knowing them to be stolen, it became a question, whether *Bank-notes* were within the statutes 3 Will. & Mary, c. 9. and 5 Ann. c. 3. which enact, "That if any person or persons shall receive or buy any *goods* or *chattels*, knowing them to have been stolen, he shall be guilty of felony;" and, after argument before all the Judges at Serjeants'-Inn Hall, it was determined that they are not; for that *Bank-notes* are neither *goods* nor *chattels* within the meaning of those statutes. It may however be contended, that a Bank-note was a valuable thing at the time when the prisoner wrote the letter on the 12th January 1796, and that this circumstance will be sufficient to make it a valuable thing by a prospective operation of the 9 Geo. I. c. 22; but it is impossible to imagine that the Legislature could mean to make the obtaining a Bank-note by means of a threatening letter a capital offence, at a period of time when the taking a Bank-note by theft, or even by the violence of robbery, would not have been a single felony, especially as in the year 1730, when the 2 Geo. II. c. 25, was passed, it was only made valuable with respect to the two offences of larceny and robbery; for the statute only says, that those who shall steal or take by robbery any Bank-note, &c. shall be guilty of the offence; and the Court in so penal a case will limit it to its prescribed boundaries, and not strain it beyond the exact line to which it has been extended by the Legislature.

(1) *Ante*, p. 468. Case 216.

THE FOURTH OBJECTION is, that even admitting this to be an offence within the meaning of the statute 9 Geo. I. c. 22. the statute was in this respect virtually repealed by the statute 30 Geo. II. c. 24. s. 1. which enacts, "That all and every person and persons who shall knowingly send or deliver any letter or writing, with or without a name or names

subscribed thereunto, or signed with a fictitious name or names, *letter* or *letters*, threatening to accuse any person of any crime punishable by law with death, transportation, pillory, or other infamous punishment, with a view or intent to extort or gain money, goods, wares, or merchandises, from the person or persons so threatened to be accused, shall be deemed offenders against law and the public peace; and the Court before whom he shall be convicted, may order such offender to be fined and imprisoned, or put in the pillory, or publicly whipped, or to be transported, according to the laws made for the transportation of felons;" and thereby makes the offence charged in this indictment a *misdemeanour* only; and where a subsequent statute inflicts a milder punishment on the same offence, it is a virtual repeal of the first statute. This rule of law was confirmed and established by the case of *Rex* v. *Cator*, 4 *Bur. Rep.* 2026. which was a conviction for seducing an artificer contrary to the statute 5 Geo. I. c. 27. but the 23 Geo. II. c. 13. having inflicted a lesser punishment on the same offence, it was held by LORD MANSFIELD to be a virtual repeal of the penalties inflicted by the former Act: so also in the case of *the King* v. *John Davis* (1), who was indicted on this very statute 9 Geo. I. c. 22. which makes it a capital offence to hunt fallow deer under the circumstances therein described; but MR. JUSTICE GOULD, who was about to try the prisoner, recollecting that the statute 16 Geo. III. c. 30. makes the offence a misdemeanour only, refused to proceed against the prisoner until he had taken the opinion of the TWELVE JUDGES on the subject, and they were unanimously of opinion, that the 16 Geo. III. c. 30. amounted to a repeal of the 9 Geo. I. c. 22. so far as it related to the killing of deer in a park inclosed. It has been said, that the statute 9 Geo. I. c. 22. and 30 Geo. II. c. 24. describe distinct and different offences, inasmuch as the first makes *a demand* of money, venison, or other valuable thing, an essential part of the description of the offence, and that the latter makes it an offence, to threaten to accuse another of a crime with a view to extort money, although *no demand* of money be made; but this distinction, even supposing it to

(1) *Ante*, p. 271. Case 135.

1796.

ROBINSON'S CASE.

exist, shews that the prisoner has not been indicted on the right statute, for the letter stated in the indictment contains no express *demand*, and agrees, in the circumstances of its contents, more precisely with the description of offence in the 30 Geo. I. c. 14. than with that in the statute on which the indictment has been mistakingly drawn; and indeed if it had been drawn even on the 30 Geo. II. c. 24. the prisoner could not have been legally convicted thereon; for it says, with a view to extort or gain "money, goods, wares, or merchandises;" and a Bank-note cannot, in the construction of such a statute, be considered either as money, goods, wares, or merchandises.

See Grime's Case, Foster, 79. Rex *v.* Leigh, *ante*, p. 52. Case 28. Rex *v.* Guy, *ante*, p. 241. Case 121. and Woolcomb *v.* Woolcomb, 3 Peer Will. 112.

MR. JUSTICE BULLER, in June Session 1796, after stating the charge in the indictment, the substance of the evidence, and the special finding of the Jury, delivered the opinion of the Judges to the following effect:—On the arguing of this case in the Exchequer Chamber, four objections were made to this conviction. FIRST, That the letter stated in the indictment was not, as the indictment alleged, a letter *without any name subscribed thereto.* SECONDLY, That the letter does not contain such *a threat* or *demand* as the law requires to constitute this offence within the true meaning and construction of the statute 9 Geo. I. c. 22. THIRDLY, That a *Bank-note* is not a valuable thing within the words "money, venison, or other "valuable thing." And, FOURTHLY, That supposing this offence to fall within the words and meaning of the statute, it is the precise offence described by the statute 30 Geo. II. c. 24. which, by making it *a misdemeanour* only, is a virtual repeal of the statute 9 Geo. I. c. 22. on which the indictment is founded.

AS TO THE FIRST OBJECTION, the question whether the letter be a letter with or without a name subscribed thereto, depends upon a simple fact appearing or not appearing upon the face of the letter itself: the letter, it is true, is subscribed with the two letters R. R., which are so far from forming any *name*, that it is impossible to tell by looking at the letter only whether they are initials referring to a name, or if so, what that name is.

1796.

ROBINSON'S CASE.

THE SECOND OBJECTION depends upon the construction of the statute 9 Geo. I. c. 22. the words of the enacting clause of which are, "That if any person or persons shall knowingly send any letter without any name subscribed thereto, or signed with a fictitious name or names *demanding* money, venison, or other valuable thing, such offender shall suffer death without benefit of clergy." The statute speaks of *a demand* generally, without requiring any particular circumstances, other than by a letter without any name subscribed thereto, or signed with a fictitious name; but the preamble recites, that "several persons had associated under the name of BLACKS, and entered into confederacies to support and assist one another in stealing and destroying deer, robbing warrens, and other illegal practices, and had in great numbers armed themselves, with their faces blacked, or in disguised habits, killed deer, robbed warrens, and had sent letters in *fictitious names* to several persons, *demanding* venison and money, and threatening some great violence if such their unlawful demands should be refused;" and it was contended by the Counsel for the prisoner, that the enacting clause ought to be restrained by the preamble, or at least so far restrained by it that *the demand* must be direct and peremptory, and accompanied with a threat of bodily harm. Where the enacting clause of a statute refers to such offences only as are contained in the preamble, it may be restrained by the preamble, but in this case it would be doing violence to very plain words, and repealing some of the obvious provisions if it were so restrained. It is no uncommon thing for the preamble of a statute to recite a particular mischief as the cause of making it, and yet for the enacting part to embrace more general objects, and to extend to other cases which the Legislature thought within the mischief. If the enacting clause in this case were to be restrained by the preamble, the statute would apply only to cases where several persons had joined together in confederacy; where the letter is signed with a fictitious name only; and where venison or money was demanded; but not to a letter without a name, nor to a demand of any other valuable thing than money or venison, nor to any demands by such

1796.

ROBINSON'S CASE.

letters, whether accompanied with a threat of bodily harm or not. But the enacting clause expressly applies to a single offender; to a letter sent without a name, as well as to one signed with a fictitious name; and to a demand of any valuable thing as well as of money or venison, and also to all demands by such letters, whether accompanied with a threat of bodily harm or not. I agree that a mere request, such as asking charity without imposing any conditions, would not come within the sense or meaning of the word "*demand*;" but here the demand is made under a threat that if it was not complied with, the prisoner would publish a libel against the prosecutor, imputing to him the death of his master, for this is the construction which the Jury by their verdict have expressly put upon this letter. Now whether the letter do amount to such a demand or not is a question for the JUDGES to determine, upon reading it as it is stated in the record, and they are all clearly of opinion that this is *a demand* within the true intent and meaning of this statute; it is a demand of money or money's worth, which a Bank-note is, by holding out a threat to impute murder to the prosecutor, and to injure his fame and his character, and not a request of voluntary charity.

AS TO THE THIRD OBJECTION, it was rightly admitted by the Counsel for the prisoner, in arguing this point of the case, that a Bank-note was *a valuable thing* at the time the demand was made; but he contended that it was not *a valuable thing* at the time the statute 9 Geo. I. c. 22. was passed; because at that time a Bank-note was not the subject of larceny; but the JUDGES are all of opinion, that if the thing demanded be valuable at the time of the demand it is sufficient, though it did not exist, or the value of it was not known when the statute was made: in truth, however, a Bank-note was a valuable thing at the time the statute was made, though it might not come under the denomination of "goods" or "chattels," or be the subject of larceny, for it was *evidence of a debt*, and it might at any time be turned into cash, and was to the owner of the value of the money for which it was given.

See REX *v.* Aslett, *post*, September Session, 1803.

1796.

ROBINSON'S CASE.

AS TO THE FOURTH OBJECTION, that the statute 9 Geo. I. c. 22. is, in respect to this particular offence, repealed by the statute 30 Geo. II. c. 24. it was truly contended on the argument, that if one Act of Parliament make a particular case a capital offence, and a subsequent Act of Parliament make the same case only a misdemeanour, the last statute is a repeal of the former: it was so decided in *Davis's Case* (1) in the year 1783, upon this very statute, which makes it *a capital offence* to kill, wound, or destroy any deer in any forest or park; but the statute 16 Geo. III. c. 30. having made that offence in the *very same words a misdemeanour* only, it was holden to be a repeal, in this respect, of the statute 9 Geo. I. c. 22. But this rule of law only applies to cases where the two statutes cannot stand consistently with each other; and in the present case the JUDGES are of opinion that the two statutes are not inconsistent; for that the statute 9 Geo. I. c. 22. extends to such cases only in which there is an *actual demand*, and the statute of 30 Geo. II. c. 24. only to such cases which fall short of a *demand* (*a*), and includes letters sent with *a view or intent* to extort money though no *demand* be made.

(1) *Ante*, page 271. Case 135.

THE consequence therefore of these opinions is, that the conviction is right.

(*a*) It is said that upon a conference on this case it was agreed by all the Judges, that if the indictment had been framed on the 30 Geo. II. c. 24, and *a demand* proved, there must have been an acquittal. 2 East's Rep. 1115.

THE KING *against* ENGLAND. CASE CCXCV.

AT the Old Bailey in February Session 1796, *Richard England* was tried before MR. JUSTICE ROOKE, present MR. JUSTICE LAWRANCE, for the murder of *William Peter Leigh Rowlls, Esq.* in a duel on the 18th June 1784, at *Cranford Bridge*, in the county of *Middlesex*.

The persons who are supposed to have been *seconds* at a duel, may refuse to give evidence on the trial of the *principals*; but their testimony may be received as the testimony of persons admitted *witnesses for the Crown*; and if once sworn, they must disclose the whole truth, although they may thereby involve themselves in the guilt of the transaction. See Rex *v.* Rice, 5 East's Term Rep. 581.

1796.

ENGLAND'S CASE.

GEORGE DENNISTHORPE, an officer in the army, on being called as a witness on the part of the Crown, refused to be sworn, and stated that as a report had prevailed that he was second to one of the gentlemen in this unfortunate rencontre, he should wish to put himself under the protection of the Court, and that if he could be indemnified against any consequences which might arise, in case he should criminate himself, he should have no objection to throw all the light he could on the subject of the inquiry.

THE COURT were all clearly of opinion that if *Captain Dennisthorpe* was sworn he must, from the nature of the oath, disclose the whole truth, and therefore his being examined ought not, under the present circumstances, to be insisted on, for that the Court could not grant him any protection.

(1) Mr. Serj. Adair, Mr. Mingay, Mr. Fielding, Mr. Lawes.

THE COUNSEL *for the Crown* (1) submitted to the Court, that he having been reported to be in the situation of an accessary to this fact, might be examined as an accomplice on being admitted a witness for the Crown, which would afford him the protection he required, adding, that as the Court sat under a Commission of Oyer and terminer, it had the same power in this respect as when sitting under a Commission of Assize, and that the evidence of *Captain Dennisthorpe* being clearly necessary to the interests of public justice, he might be admitted a witness for the Crown in the same way as all witnesses of that description are admitted; and then, if any prosecution should be hereafter instituted against him, THE ATTORNEY GENERAL will grant a *nolle prosequi*.

THE COURT proposed to tell *Captain Dennisthorpe* that they could not absolutely protect him, but that if he chose to tell the whole truth, they would recommend him to the Crown as an object of mercy, and desired to hear any objection the Counsel for the prisoner might have to this proposal.

(2) Mr. Erskine, Mr. Garrow, Mr. Const.

THE COUNSEL *for the prisoner* (2), objected to *Captain Dennisthorpe* being examined in the manner proposed, and contended that it was introducing a new and dangerous practice into the criminal jurisprudence of the country; that a witness could not be put into such a situation of indemnity;

1796.

ENGLAND'S CASE.

that there were a variety of precedents from which it might be fairly inferred that a witness could not be so indemnified. In *Dr. Dodd's Case*, which was an indictment for forging a bond in the name of *The Earl of Chesterfield*, it was not conceived that *Mr. Robertson*, the subscribing witness to the deed, and presumptively implicated in the guilt of the transaction, could be intitled to any hope of indemnity (1) excepting in the usual course and according to the constant practice, *viz.* that an accomplice in guilt may intitle himself to the hope of a pardon by making, antecedently to the time of trial, a full confession of his guilt, and on the trial, disclosing the whole of his knowledge of the transaction, and this is the only mode by which he can give himself a fair claim to the clemency of the Crown. But this is a course of proceeding essentially different from that which is now proposed: no promise is previously made to him that he shall be recommended to mercy *if* he will disclose the whole truth, but he discloses the full extent of his own and his principal's guilt, and relies entirely upon the unpromised mercy of the Crown. In the case of *Mr. Purefoy* (2), which is in its circumstances analogous to the present, for it was an indictment for the murder of *Colonel Roper* in a duel, *General Stanwix*, who was second to his unfortunate friend, was called as a witness on the part of the Crown, and he refused on the same ground as *Captain Dennisthorpe* now refuses to be examined. The point was debated, not only by the Counsel for the prosecution and by the Counsel for the prisoner, but by a special Counsel on the part of *General Stanwix*, and he was ultimately examined without any promise of indemnity whatever. So also in *Allen* and *Morris's Case* (3), *Mr. Delancey*, who had been second in a duel to *Mr. Dulaney*, in which the latter gentleman fell, answered as a witness without any indemnity. So also in the case of *Colonel Cosmo Gordon* (4), who was tried for killing *Colonel Thomas* in a duel in Hyde Park; *Captain Hill*, who was *Colonel Thomas's* second, wished to decline giving his testimony, but the Learned Judge who tried that indictment told him that he might chuse whether he would be examined or not, and he submitted to be examined, but not upon any promise of indem-

(1) *Ante*, page 155. Case 85.

(2) Tried at Maidstone Assizes before MR. BARON HOTHAM.

(3) O. B. June Session 1782.

(4) O. B. Sep. Sess. 1784, *ante*, page 330, *notis*.

1796.

ENGLAND'S CASE.

nity (*a*). But now the Court is requested, in contradiction to all precedent, to hold out an assurance of indemnity to *Captain Dennisthorpe*, who attended and was examined before the Grand Jury when the bill was found.

Serjeant Adair for the Crown.

MR. JUSTICE ROOKE, after some consultation upon this point, desired *Captain Dennisthorpe* might be called in, and on his appearance,

MR. JUSTICE ROOKE said—The Court has made up its mind upon this subject. We cannot compel you to answer contrary to your inclination; neither can we absolutely give you any legal indemnity against the consequences of your testimony. But we may and do assure you that if you tell the truth, the whole truth, and nothing but the truth, you will have that claim on the favour of the Crown which the honourable ingenuousness of witnesses never fails to obtain; and you may rely on it that such conduct will powerfully recommend you to his Majesty for that protection and mercy which are invariably extended to accomplices, and guard you from any future consequences of your evidence; but whether you think it safe for you to depend on this assurance it is for you to determine.

CAPTAIN DENNISTHORPE, after some conversation respecting his safety, declared that as a report had gone abroad that he was second to one of the parties, he thought there would be some danger in being examined, and therefore he declined to be sworn.

Depositions taken before the Coroner on an inquisition of murder cannot be read in evidence on the trial of the indictment, though the deponents are dead, if they are not *signed* by the coroner, or if signed, his hand-writing cannot be proved.

MR. SERJEANT ADAIR moved the Court to admit in evidence the depositions made before the Coroner on view of the

(*a*) The indictment against the Hon. *Cosmo Gordon* was tried before MR. BARON EYRE, present MR. JUSTICE GOULD and MR. BARON HOTHAM, at the Old Bailey in September Session 1784. The deceased was accompanied to the field by a gentleman of the name of *Hill*, who was called as a witness by the Counsel for the prosecution; but before he was sworn, the Court informed him that seconds in a duel are equally involved in the guilt of murder with the surviving principal, and that he was not bound to answer any questions that might tend to prove that he had acted in the character of second.

1796.

ENGLAND'S CASE.

dead body of *Mr. Rowles*, on the ground that the Coroner and the four deponents whose depositions he intended to read were dead, and that therefore those depositions were the best evidence he had it now in his power to offer of the facts they contained.

A witness was accordingly called, who proved that he was present when the Coroner took the inquisition; that he saw the depositions in question taken down by the Coroner in writing; that he had heard them afterwards read to the respective deponents, and that the said deponents were dead. But not being able to recollect whether he saw the Coroner *sign* them, or to prove his hand-writing,

See 1 & 2 Phil. & Mary, c. 13. s. 5.

THE COURT declared them to be inadmissible.

THE KING *against* NORREG THOMPSON.

CASE CCXCVI.

A house into which the owner has only removed his goods, but has not slept in it, is not his *dwelling-house* as to the crime of *burglary*.

S. C. 2 East, 498.

AT the Lent Assizes at *Kingston*, for the county of *Surry* 1796, *Norreg Thompson* was tried before MR. JUSTICE GROSE, for burglariously breaking and entering the dwelling-house of *Thomas Parry*, at *Stoke Newington*, on the 9th November preceding, and stealing two Brussels carpets, and a quantity of wearing apparel and other articles, the property of the said *Thomas Parry*.

IT appeared in evidence that the prosecutor had recently before hired a house in *the Apollo Plotts*, in *Walworth*; that neither he nor any of his family or servants had ever slept therein; but that he had removed a great part of his household furniture into the house, which was locked up in the house after dark on the 9th November, and the door broke open and the goods taken away before daylight the ensuing morning.

THE COURT were of opinion that this house, as no person had inhabited it, could not be considered as *a dwelling-house*, so as to satisfy an indictment for burglary.

AND the prisoner was accordingly acquitted (*a*).

(*a*) See the Case of Lyon Lyons, Old Bailey January Session 1778, *ante*, page 185. Case 93. Holland's Case, Exeter Spring Assizes 1790, 2 East 498. John Harris's Case, Old Bailey October Session 1795, *ante*, page 701. Case 288. and Rex *v.* John Davis, Old Bailey 1800, *post*.

1796.

CASE CCXCVII.

A letter threatening to accuse a person of an unnatural crime unless he redelivers to the writer *a promissory note* which he had before given him in discharge of a debt, is not within the statute 30 Geo. II. c. 24. which makes it an offence to write a threatening letter with intent to extort "*money, goods, wares,* or *merchandises*" S. C. 2 East, 1118.

THE KING *against* EDWARD MAJOR.

AT the Old Bailey in June Session 1796, *Edward Major* was tried before MR. JUSTICE BULLER, on an indictment charging, that he, on the 1st June, intending to extort and gain *money* from one *Augustine Rayner*, unlawfully, knowingly, and designedly did send to the said *Augustine Rayner* a certain letter in writing, &c. of which the following is a copy:

"Mr. Rayner, No. 81, *Aldersgate-street.*

"SIR,

"I received the letter respecting *the bill* which I gave you when we parted, and you know that I have it not in my power to pay it; and if I had, it is an unjust demand; and I have only to observe, if you do not immediately return it to me, as an acknowledgement for that obscene offence of sodomy attempted upon me on Saturday, the 22d August last, I am determined to prosecute you with the utmost rigour of the law, that that which is done in secret may be revealed on the house-tops.

"E. MAJOR.

"1 June 1796."

with a view and intent to extort and gain *money* from the said *Augustine Rayner* against the form of the statute, &c.

RAYNER followed the business of making copy-books, and, about two years before, had entered into a partnership with the prisoner, which lasted twelve months, and at the expiration of which there was a balance of 50*l.* in favour of the prosecutor, and in satisfaction of which, and in settlement of all accounts between them, he had taken the prisoner's note for 9*l.* 10*s.* 10*d.* which became due in December 1795. In the month of June 1796, he received by the penny-post the letter, of which the above is a copy.

THE Jury found the prisoner Guilty, and added that there was not the least foundation for his charge against the prosecutor.

1796.

MAJOR'S CASE.

THIS indictment was founded on the statute 30 Geo. II. c. 24. which enacts, "That all persons who shall knowingly send or deliver any letter or writing with or without a name or names subscribed thereto, or signed with a fictitious name or names, letter or letters, threatening to accuse any person of any crime punishable by law with death, transportation, or pillory, or any other infamous punishment, with a view or intent to extort or gain, *money, goods, wares*, or *merchandises*, from the person or persons so threatened to be accused, shall, on conviction, be put in the pillory, publicly whipped, or fined and imprisoned, or transported, not exceeding the space of seven years, in the discretion of the Court."

THE COUNSEL *for the prisoner* moved in arrest of judgment that *a note of hand* could not be construed to be either "money, goods, wares, or merchandises," within the meaning of this statute (*a*).

THE question was saved for the opinion of the JUDGES, and in July Session 1797, the prisoner was put to the bar, when

MR. JUSTICE BULLER delivered the opinion of the JUDGES as follows: You were tried on an indictment which charged you with having written a letter addressed to *Augustine Rayner*, threatening that you would accuse him of having committed an unnatural crime; and that you did this with an intent to extort and obtain *money* from him. It appeared upon an examination of the witnesses, and upon the production of the letter in evidence, that it was not your intention to extort *money* from the said *Augustine Rayner*, but to compel him by the force of this threat to restore to you *a promissory note* which you had given to him for money that was due from you to him. A question therefore arose in my mind whether this evidence was sufficient to maintain the fact charged in the indictment, and I thought proper to re-

(*a*) But by 52 Geo. III. c. 64. the statute 30 Geo. II. c. 24. is now extended not only to money, goods, wares, merchandises, but also to any bond, bill of exchange, bank-note, promissory note, or other security for the payment of money, or any warrant or order for the payment of money, or delivery or transfer of goods or other valuable thing.

1796.

MAJOR'S CASE.

serve it for the consideration of all the Judges. The Judges have accordingly considered of this case, and particularly whether a note of the description and under the circumstances I have mentioned, is within the meaning of the words "money, goods, wares, or merchandises," in the statute of the 30 Geo. II. c. 24. on which the indictment was founded; and they are all unanimously of opinion, that a note given by you to *Rayner* for a prior debt due from you to him, does not fall within the description of either "money, goods, wares, or merchandises;" and therefore, in consequence of this opinion, you must be discharged from this indictment.

CASE CCXCVIII.

THE KING *against* WILLIAM JENKS.

An indictment for burglariously breaking and entering the house of *A.* with intent to steal the goods of *B.* is bad if no person of that name had any property in the house.

S. C. 2 East, 514.

AT the Old Bailey in June Session 1796, *William Jenks* was tried before MR. JUSTICE LAWRENCE, present MR. JUSTICE BULLER, and SIR A. MACDONALD, Chief Baron, for burglary.

THE indictment charged "That *William Jenks*, &c. on 23 May 1796, about the hour of one in the night of the same day, with force and arms, &c. in the dwelling-house of *Joseph Davis* there situate, feloniously and burglariously did break and enter with a wicked and felonious intent the goods and chattels of the said *Joseph Wakelin* in the same dwelling-house then and there being feloniously and burglariously to steal, take and carry away, against the peace, &c."

THE burglary was clearly proved, but it appeared that no such person as *Joseph Wakelin* had any property in the house: the fact was, that the clerk of the indictments at Hicks's Hall had, by mistake, inserted the name of *Wakelin* instead of that of the prosecutor *Davis*.

IT was contended that this mistake had vitiated the indictment; for that as it was part of the prosecutor's charge, that the prisoner had broke and entered the house with intent to steal the goods of *Joseph Wakelin*, he was bound to prove that fact precisely, as it was laid in the indictment.

1796.

JENKS' CASE.

BUT THE COURT inclined to think that this mistake was not material as to *the burglary*, for that that part of the offence being laid *with intent* to steal, the *git* of it was the breaking and entering the house with such an intent, and that it was quite immaterial to whom the property which he so intended to steal belonged; for that such an indictment "with intent the goods and chattels in the same dwelling-house then and there being, feloniously and burglariously to steal, &c." would be sufficient; but that if it was material, the word *Wakelin* might be rejected as surplusage, and then it would stand "with intent the goods and chattels of the said *Joseph* in the same dwelling-house then and there being, feloniously and burglariously to steal, &c." And on this direction

THE Jury found the prisoner Guilty; but the judgment was respited, and the point saved for the consideration of THE TWELVE JUDGES.

AND in the Michaelmas Term following a majority of THE JUDGES were of opinion that the direction was wrong; for that in an indictment of this description it was necessary to show to whom the property belonged, in order to render the charge complete, and the words "of the said *Joseph Wakelin*" being material could not be rejected as surplusage.

THE KING *against* PARKES AND BROWN.

CASE CCXCIX.

AT the Old Bailey in September Session 1796, *Mathias Parkes* and *Thomas Brown* were tried before MR. JUSTICE ROOKE, present MR. BARON THOMPSON, on an indictment which charged them with forging a promissory-note, of which the following is a copy:—

"RINGHTON, *Salop*, *April* 20, 1796.

"No. B. 248.

"I PROMISE to pay to bearer, on demand, at *Messrs. Down*,

If a person authorize another to sign a note in his name, dated at a *particular place*, and made payable at *a banker's*; and the person in whose name it is drawn, represent it to be the name of *another person*, with intent to defraud, and no such person as the note and the representation import, exists, this is *forgery*; for it is *a false making* of an instrument in the name of a *non-existing person*. S. C. 2 East, 963, 992.

1796. PARKES' CASE.

Thornton and Co.'s, Bankers, *London*, the sum of five guineas, for value received (*a*), For Self and Co.

" FIVE GUINEAS. THOS. BROWN."

" *Entered*, T. B."

With intention to defraud *William Hulls*.

THERE was a second count for uttering the same, knowing it to be forged.

THE prosecutor, *William Hulls*, was a boot and shoe-maker, opposite *Brook-street*, in *Holborn*, and had known both the prisoners for about twelve months previous to this transaction. On the 13th June 1796, the prisoner *Brown* went to the shop of the prosecutor, and told him that he wanted some boots and shoes; that he was a Captain in the army, in the 17th regiment of foot, going out to the West Indies; and in all probability he should be shot before he should be able to wear them out. The prosecutor accordingly shewed him different articles, and *Brown* having looked out a parcel of boots and shoes, amounting to the sum of 6*l.* 8*s.* told the prosecutor that if he would send them with him by his boy, the money should be sent back. The prosecutor, however, having before let *Brown* have some goods, which he had never paid for, thought it prudent to carry this parcel himself. *Brown* and *Hulls* accordingly walked out of the shop together, and during the conversation which took place as they passed along the street, the prosecutor told *Brown* that he had had the pleasure of making up some boots for several of the gentlemen belonging to the 17th regiment, and asked him whether he knew *Captain Dixon* and *Major Row*, and why he had not gone out with them. *Brown* replied that those gentlemen were not only known to him, but were his intimate friends and constant companions, and that he had been under orders with them in *Ireland*. *Brown* also said, that his brother was agent to the 17th regiment; that he expected to see him at the *City Arms*; and that he was sure, upon his recommen-

(*a*) The words " I promise to pay the bearer on demand," and the words " the sum of Five Guineas for value received for Self and Co." were printed in the note.

1796.

PARKES' CASE.

dation his brother would give him an order for boots and shoes to a considerable amount. They proceeded accordingly, across the fields to *the City Arms*, which is in the County of *Middlesex*, and sat down together on a bench in the garden, in expectation of the arrival of *Brown*'s brother, who, *Brown* said, had just married a lady with a fortune of 15,000*l.* and had deposited it in the hands of *Down* and *Thornton*. The brother, however, not appearing, *Brown*, after some time, rose from his seat, and went into the house, and returned again with expressions of disappointment at the absence of his brother, adding, "I am sorry I cannot pay you in gold, but I can give you what is just as good, *one of my brother's drafts;* for which I have been into the house to get cash, but the landlord has not enough by him." *Brown* then produced the note in question, and gave it to *Hulls* to look at. *Hulls* said, "What, is this upon the money that is at *Down* and *Thornton's?*" *Brown* replied: "Yes; my brother and I always pay every thing in this way on demand, for we want no credit; if it were for 100*l.*—go there, and the money is ready; I am sorry, *Mr. Hulls*, that I cannot give you the balance; but if you will call upon me at *Mr. Drummond*'s, No. 10, *Hart-street*, *Bloomsbury*, at three o'clock, I will give you the three and twenty shillings; you will meet my brother and myself, and three or four gentlemen there at that hour, and you shall have an order for as many pair of boots as you can possibly make between this and the time of sailing." The prosecutor believing the name *Thomas Brown* at the bottom of the bill to be the prisoner's brother's hand-writing, and that he was the person the prisoner had represented him to be, took the note, and leaving, by the desire of *Brown*, the parcel containing the boots and shoes at the bar of the *City Arms*, went immediately to *Down* and *Thornton*'s, where he was informed that the note was a forgery. On this discovery, he applied to the Lord-Mayor for an officer, and they went directly back to the *City Arms*, to prevent the goods being delivered to the prisoner, but it appeared they had been taken away in a few minutes after they had been left at the bar. This was between the hours of eleven and twelve o'clock,

1796.

PARKES' CASE.

and exactly at three o'clock, *Hulls*, accompanied by the peace-officer, and some private friends, went, pursuant to the appointment, to No. 10, *Hart-street*, *Bloomsbury*, but no such name as *Drummond* was there to be found. He then went to *Bow-street*, and gave information to the Magistrates of the transaction, and the runners, on the ensuing day, apprehended *Brown* at *Mr. Smith*'s, No. 6, in *Fan-court*, *Goswell-street*, in the act of attempting to buy some watches. It was proved by one of Messrs. *Down* and *Thornton*'s clerks, that they never had any correspondent with their house of the name of *Thomas Brown*, of *Ringhton*, in *Salop*. It was also proved by *Cox* and *Greenwood*, of *Craig's Court*, *Charing-cross*, the real agents for the 17th regiment of foot, that there was no person of the name of *Brown* had ever been either *a Captain* in, or *an agent* for, that regiment. Evidence was also given by the collector of the poor's rates of *Ringhton*, in *Salop*, that no person of the name of *Thomas Brown* lived at that place. On the spot where *Brown* had been bargaining with *Smith* for the watches were found three notes for five guineas each, dated *Ringhton*, signed "*M. Parkes*, entered, T. B." and drawn on *Drummond and Co.* the numbers of which were, A. 243; A. 244; A. 246; and on searching *Brown*, there were found upon him a note for 5*l.* 5*s.* on *Drummond and Co.* No. 245. On the 21st June, one of the city constables apprehended the other prisoner *Parkes*, and on searching him there were found forty-two five guinea notes; and also a copy of the commitment of *Brown* to the Poultry Compter by the Lord-Mayor, which, on producing the original commitment, and proving his Lordship's signature thereto, appeared to be an exact copy: It was also proved by *Mr. Manning*, an attorney, that the signature "*Thomas Brown*" to the note stated in the indictment, and also the written parts of the body of the note, for it was partly written and partly printed, were in the hand-writing of the prisoner, *Mathias Parkes*. Among the papers found on the person of the prisoner *Brown*, was a letter, which was proved to be in the hand-writing of the prisoner *Parkes*, signifying to *Brown*, that "counsel would attend him on the morrow on his examination before the Lord

Mayor at the Mansion-House; enjoining him to keep his own counsel; desiring him to send his wife to him the moment the examination was over;" and, after expressing his apprehension that he would be committed for trial, exhorting him, "to fear nothing; for that commitment and trial would be all they could do to him."—Another paper was also found in *Brown's* custody, directed "To *Mr. Thomas Brown, New Compter;*" containing a receipt, in the following words:—"London, May 10, 1796.—Received, this day, of *Mr. Thomas Brown*, the sum of twenty-one pounds, for four Five Guinea Bills, drawn by myself;—I say received. *M. Parkes, Ringhton, Salop,*" and both the superscription and the receipt were proved to be *Parkes'* hand-writing. It appeared that *Brown* was a regularly attested soldier in the Loyal British Rangers; that he had been promoted to the station of Serjeant; and that at the time of this transaction he was in the recruiting service, and had been sworn in by the name of *Thomas Brown.* It was also proved that the plate from which the printed part of this note was impressed, was engraved in the month of March preceding, by an engraver in Chancery-lane; but who he had engraved it for he could not recollect; nor did he know either of the prisoners at the bar.

ALLEY, *for the prisoners*, contended, that as the name of *Thomas Brown* had been signed by *Parkes* with *Thomas Brown's* privity and consent, it could not be, in contemplation of law, a falsely forged and counterfeited instrument: that no insinuation made by *Brown*, that his name so signed was the name of his brother, however *fraudulent* his intention might be in so doing, could alter the nature of the instrument, and make it a false instrument; and that supposing it could be so construed, yet that *Parkes* not having been present when *Brown* uttered it in the county of *Middlesex*, he, *Parkes*, could not, upon such an uttering, be presumed to have forged it *in the county* in which the indictment is laid. But after these points had been argued at great length, at the bar,

THE JURY, under the direction of the Court, found, *specially*, that *Parkes*, with the privity and consent of *Brown*,

1796. had written the name of *Thomas Brown*, at the bottom of the note in question; and that *Brown*, knowing the name to have been so written, had uttered it under a representation that it was the name of his brother, knowing that it was not so, and with an intention to defraud *William Hulls*; but whether the prisoners were in law guilty of the crimes imputed to them by the indictment, they referred to the consideration of the Court.

PARKES' CASE.

A general verdict of "*Guilty*," however, was taken, by the direction to the Court; and the case as above stated, reserved for the opinion of the TWELVE JUDGES; on the following objections: FIRST, That the name *Thomas Brown* was the real name of the prisoner *Brown*. SECONDLY, That it was no forgery in *Parkes* to sign the name *Thomas Brown* with his consent. THIRDLY, That if *Parkes* were not guilty of forgery, *Brown* could not be guilty of uttering the note, knowing it to be forged. FOURTHLY, That the subsequent misrepresentations of *Brown* ought not to affect *Parkes*, as there was no evidence that he was aware of the fraudulent circumstances under which *Brown* would utter the note; for that misrepresentations do not amount to forgery, or make that a forgery which was not so at the time of the original making.

See Jones's Case. *ante*, page 204. Case 103.

THE case was accordingly argued before all the Judges, at Serjeants'-Inn Hall (*a*), in the month of May 1797, by

ALLEY, *for the prisoners.* The evidence given in this case, does not prove the charge alleged against the prisoners by the indictment. The indictment charges, that the prisoners "feloniously did falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged and counterfeited, and did willingly act and assist in the false making, forging and counterfeiting a certain *promissory note*, &c. which said promissory note, so falsely made, forged and counterfeited, is as follows," &c.—The indictment pursuing the common law definition of the crime of forgery, states the material

(*a*) It is said by Mr. East, that the argument was in the Exchequer Chamber.

1796.

PARKES' CASE.

point of the offence to consist in the *false making* of this promissory note; for the terms of the definition of forgery, as laid down by *Sir Edward Coke*, *Sir Matthew Hale*, *Mr. Serjeant Hawkins*, and all the writers on Crown Law, are, "the false making or altering a writing to the prejudice of another;" and the statute 2 Geo. II. c. 25. upon which this indictment is founded, is so far from making any alteration in this definition of forgery at the common law, that it adopts the words of it, and enacts, "That if any person shall *falsely make*, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly act or assist in the false making, forging or counterfeiting any promissory note for payment of money, &c. with intention to defraud, such person shall be deemed guilty of felony." The question therefore is, whether the evidence proves this note to be a *false instrument*; for, if it be not a false instrument, it cannot be the subject of forgery. But it may be previously necessary to inquire what is *a false instrument* in the eye of the law. A false instrument is that which purports, upon the face of it, to be the instrument of one whose instrument, in point of fact, it is not: that is, it must be either an instrument which appears to be signed in the name of a person, whose subscription it does, in fact, not bear, or an instrument which, if bearing his name, was signed without the consent of the person whose name it purports to be: or an instrument signed in the name of a fictitious person. To constitute a false instrument the act of forging must be done in the name of another person (1), whether such person be in existence or not. This, therefore, being the true definition of a false instrument, it follows that the present note produced in evidence cannot be a forgery if it be the signature of the person whose name it bears, either by his own subscription or by the hand-writing of another by his authority; for there can be no doubt but that one man may bind himself by authorizing another to sign his name. The party representing his real signature to be the name of another person at the time the note was uttered, will not make it a forgery, for an instrument cannot be altered from what it really is by a false

(1) 3 Inst. 169. 1 Hawk. P. C. 537.

1796.

PARKES' CASE.

representation. A person by so doing may be guilty of another description of offence, but cannot be guilty of forgery. I have taken the liberty to lay down two propositions, FIRST, that in order to constitute forgery, a false instrument must be made; and, SECONDLY, that a false representation of a true instrument cannot change its nature. In support of the first, I shall cite the case of *the King* v. *Aicles* (1), in which the question was, whether a person, who has for many years been known by a fictitious name, assumed for the purposes of fraud, and afterwards retakes his real name, and in that name signs a promissory note, by means of which he defrauds a linen-draper of a parcel of goods, can be considered as having *forged* such promissory note? and the Twelve Judges were of opinion that it could not be forgery. And in *John Hevey's Case* (2) it was determined, that to utter an order for payment of money under a *false assertion* of being the payee of the order, is, if it appear to have been made for the purpose of fraud, a misdemeanour only; and that an uttering under such circumstances is not evidence of the order having been forged. But it may be said, that the false representation made by *Brown*, the prisoner, that the signature of *Thomas Brown* was the name and signature of his brother, will vary this case from the case of *the King* v. *Aicles*, and convert it into a forgery; but such a conclusion would be repugnant to the law, as it was settled in the case of *Rex* v. *Thorogood*, in the King's Bench, in which it was determined on a special verdict, after long argument, that a man cannot be guilty of forgery in making a false representation. On the authority of these two cases, I rely with perfect confidence for the safety of my client. There is also the case of *David Woodward*, to the like effect. He was indicted for that he, on the 25th December 1795, had feloniously and falsely forged and counterfeited a certain paper writing called a promissory note for the payment of money, and commonly called a Plymouth Bank-note, for the payment of the sum of five guineas, &c. to the tenor following: "Plymouth, 3d June, 1795. I promise to pay to bearer, on demand, here or at Messrs. *Hankey*, *Chaplin*, *Hall* and *Han-*

(1) *Ante*, page 438. Case 202.

(2) *Ante*, page 229. Case 115.

Rex *v.* Jones, otherwise Thorogood, *ante*, page 204. S. C. Dougl. 302.

Lent Assizes, Kingston in Surry, on 24 March 1796, *cor.* Grose J.

1796.

PARKES' CASE.

key's, Bankers, London, FIVE GUINEAS, value received. D. WOODWARD." with intent to defraud, 1st, *Hankey & Co.* 2dly, *Thomas Leigh.* The prisoner was a soldier, and at the instigation of another person, put *his own name* to the note, and then passed it to a *Mrs. Williams*, to whom the prosecutor gave cash for it: the other person had persuaded him to sign the note, by agreeing to give him two guineas out of the five if he got the money from *Mrs. Williams*, directing him to say, that he came from the Serjeant-Major of the regiment, and wanted cash for it; which he did, and received the money, giving the person 3*l.* 3*s.* and retaining the other 2*l.* 2*s.* for his trouble. But the moment it appeared to be the real signature of the prisoner, the Court immediately said that he must of necessity be acquitted; for that being signed in his *own name*, it could not be a *false instrument*, and therefore not a forgery; and he was acquitted accordingly:—As therefore it appears both by the principles I have laid down, and the precedents I have quoted, that a promissory note, signed by one man, in the name of another, with his privity and consent, is not a *false instrument*, and that no representation, made by a party uttering *a true instrument* can alter or change its nature, it follows that the prisoner, *Thomas Brown*, cannot be guilty of the offence imputed to him by this indictment. But if the Court should be of a different opinion, the case of the prisoner, *Parkes*, is materially different from that of *Brown*: *Parkes* was not present when the note was uttered in payment, and therefore he cannot be considered as a *particeps criminis* in that part of the charge. He indeed wrote the name of *Thomas Brown* to the note, but that is no offence, inasmuch as he wrote the true name, and wrote it, as appears, by the assent of *Brown*, and with his approbation. If *Brown* had only used the note as it was written, in his own name, and had not made any false representation concerning it, there could have been no pretence of forgery; and as *Parkes* was not present when that representation was made, he cannot, according to the rules of law, be implicated in the consequences of it, for one man is not bound by the declaration of another in his absence. But

1796.

PARKES' CASE.

even admitting the note to be a forgery, and that *Parkes* had written the name without any authority, still he was improperly convicted, because the Jury who tried him was a *Middlesex Jury*, and there was no proof whatever that *Parkes* signed the name in *Middlesex*; the only act proved to have been done in that county was the uttering of the note by *Brown*, but that cannot be taken as proof that *Parkes* signed the name in *Middlesex*; for it is a rule that nothing material shall be taken by intendment or implication, and therefore, as that material fact was not proved, it must be considered as not having existed, *nam non existentibus et non apparentibus eadem est lex.* The *locus in quo* was not ascertained, and as all capital offences must be tried in the local jurisdiction, unless where otherwise directed in certain cases, by act of parliament, it ought necessarily to have been proved where the act was done. In larceny, indeed, an offender taken with the *mainour*, may be tried in the county where he is apprehended, but not in burglary or in robbery. It is from the want of proof of the place in which forgery is committed, that the Jury decides on the count for uttering, &c. unless where, as in *Dr. Dodd's Case*, a *particeps criminis* proves the *locus in quo* (*a*): and the case of *Rex* v. *T. Thomas* is upon this subject precisely in point.

1 Hale 507.
4 Bl. C. 305.
2 Hale 21, 22.
3 Inst. 27.

Mr. Justice Grose in December Session 1797, delivered the opinion of the Judges to the following effect. This case has undergone the consideration of the Judges. The Jury found *Mathias Parkes* guilty of having signed the note in question, and *Thomas Brown*, the prisoner at the bar, guilty of having uttered it, knowing it to have been signed as and for his name, by *Mathias Parkes*. The Counsel for the prisoners took several objections, First, That the name, *Thomas Brown*, was really the name of one of the prisoners; Secondly, That it could not be forgery in *Parkes*, as he had signed the name of *Tho-*

(*a*) Dodd's Case, Old Bailey February Session 1777, *ante*, page 135, Case 85.; Perreaus' Case, included in Mrs. Rudd's Case, *ante*, page 127.; and the first point in Thomas Thomas's Case, Old Bailey December Session 1794, *ante*, page 634. Case 275.

1796.

PARKES' CASE.

mas Brown with *Thomas Brown*'s consent; THIRDLY, That if *Parkes* was not guilty of having forged the note, *Brown* could not be guilty of uttering it, knowing it to be forged; and FOURTHLY, that the subsequent misrepresentation made by *Brown*, at the time he passed the note to *William Hulls*, ought not to affect *Parkes*, who was not privy to the circumstances under which the note was uttered. The questions, however, as far as they respect *Thomas Brown*, are only, FIRST, Whether the note in question is, in construction of law, *a forged note;* and SECONDLY, Whether it was uttered by *Brown*, with a knowledge of its having been forged. As to THE FIRST QUESTION, the definition of forgery is, "*the false making* a note or other instrument with intent to defraud:" A note or other instrument may be falsely made, either by putting on it the name of a person who does not exist, as in the case of *Rex* v. *Taft* (1), or by putting on it the name of a person who does exist, without the consent of such person, as in the case of *Rex* v. *Bolland* (2). The present is a case where the name of a person *who does not exist*, has been put to the note. *Thomas Brown* produced to the prosecutor a note, dated *Ringhton*, Salop, which note purported to be drawn by a *Thomas Brown* for himself and company, whereby he promises to pay five guineas to the bearer, at *Messrs. Down, Thornton and Co.*'s, bankers, LONDON. *Brown*, the prisoner at the bar, at the time he uttered this note to *William Hulls*, did not utter it as *his own note*, but as *the note of his brother*, of the same name; but there is no brother to the prisoner of the name of *Thomas Brown* existing, and therefore this was the false making of a note in the name of *a non-existent person;* for it is equally a forgery whether the non-existing person be described as bearing the name of the person uttering the note, or another name. The prisoner, therefore, although his name is *Thomas Brown*, having uttered this note, describing the signature as the name of another person, is as guilty of having uttered a forged note as if he had uttered a note on which any other name whatever had been forged. This answers the first objection respecting the name being the real name of the prisoner at

(1) *Ante*, page 172. Case 88.

(2) *Ante*, page 83. Case 47.

1796.

PARKE'S CASE.

the bar; and as to THE SECOND OBJECTION, that it was no forgery to sign the name of *Thomas Brown* with *Thomas Brown*'s consent, the answer is short; for as no such person existed, to whom the name of *Thomas Brown*, as signer of the note, was given (*a*), there could be no such consent: It was signed by the authority of A *Thomas Brown*, but not by the consent of THE *Thomas Brown* whose name it purports to be: no such person existed; for the *Thomas Brown* whose name is signed to the note, was, according to the very description of that note, then a resident at *Ringhton* in *Salop*; it imports that he was a correspondent of *Down, Thornton and Co.*; that he had money in their hands, and, from the other parts of the evidence, that he was the brother of the prisoner; but it was clearly proved that there was no person of that name and description existing at *Ringhton*; that no person

(*a*) In an action by the indorser of a bill of exchange for 90*l.* against the acceptor, it appeared that the bill was drawn at *Dunkirk*, by *Christian*, upon *Young*, in *London*, payable "to *Henry Davis*, or order:" and having been put into the foreign mail, inclosed in a letter from *Christian*, it got into the hands of another *Henry Davis* than the one in whose favour it was drawn. *Young* accepted the bill, and the *Davis* into whose hands it had fallen, indorsed it in his own name, "*Henry Davis*," and discounted it with *Mead*; he not knowing the *Henry Davis* from whom he took it; and after verdict for plaintiff, on a motion for a new trial, the question was, whether the name *H. Davis*, to whom the bill, on the face of it, was payable, should or should not convey a title to the plaintiff: and three Judges were of opinion that a new trial ought to be granted, for that in order to derive a legal title to a bill of exchange, it is necessary to prove the hand-writing of the payee, and therefore though the bill may come by mistake into the hands of another person, though of the same name with the payee, yet *his indorsement* will not confer a title; for such indorsement, if made with knowledge that he is not the person to whom the bill was made payable, is A FORGERY; and no title can be derived through the medium of a fraud or forgery. The circumstance of his bearing the same name with the payee, cannot vary the case, since he was not the same person. The definition of forgery is the *false making* of any instrument, indorsement, &c. with intent to defraud, and it makes no difference whether the person making this false instrument, were or were not of the same name with the payee, since he added the signature "*H. Davis*," with a view to defraud; and knowing that he was not the person for whom the bill was intended. Mead *v.* Young, 4 Term Rep. 28. to 33.

1796.

PARKES' CASE.

of that name had any correspondence with, or ever kept cash at *Down and Thornton*'s; and that no person, such as the prisoner *Brown* represented his brother to be, existed; and as this note was undoubtedly fabricated for the purposes of fraud, it is according to the legal definition of forgery, a false making of a note in the name of *Thomas Brown*, a non-existent person, with intention to defraud. The remaining question, whether the prisoner uttered the note knowing it to have been forged, is decided by the evidence given on the trial, and by the verdict found thereon. The prosecutor proved that the prisoner, at the time it was uttered, said it was his brother's draft; that he was an agent in the 17th regiment; that he should see his brother soon; that the note was to be paid out of monies lodged in the hands of *Down, Thornton and Co.*; that he appointed Mr. *Hulls* to meet him at three o'clock in the afternoon at *Mr. Drummond*'s, No. 10, *Hart-street*, in *Bloomsbury*; and the Jury have found, from the falsehood of these facts and circumstances, that he uttered it with full knowledge of the forgery, and the Judges are of opinion that he has been found guilty upon very sufficient evidence. But it is said, that if *Parkes* was not guilty of forging this note, the prisoner cannot, in law, be guilty of uttering it knowing it to have been forged; but the indictment does not charge that he uttered the note knowing it to have been forged by *Parkes*, but only with knowing it to have been forged, and therefore whoever it might have been forged by, his having uttered it, knowing it to have been forged, makes him guilty of the offence charged in the indictment. The opinion of all the Judges therefore is, that *Brown* must receive the judgment of the law.—But with respect to *Parkes*, a majority of the Judges were of opinion that there was not sufficient evidence to shew that the forgery was committed by him in the county of *Middlesex*, where the indictment was laid; for they thought that the bare fact of the note having been uttered in that county by *Brown*, taking him even to be an accomplice, was no evidence of the forgery itself having been committed there. Some of the Judges thought that the *fact of finding* the forged instrument in the county of *Middle-*

See S. C. 2 East, 993.

1796.

PARKES' CASE.

See B. Crockett's Case, *post.*

sex, in which county it also appeared that *Parkes* was, was evidence, in absence of other proof, of the fact of the forgery having been committed there: the majority, however, agreed that it was a question of evidence for the Jury; but thought there was no proof in this case to warrant the conclusion that it was forged in the county of *Middlesex*.

THE prisoner, *Brown*, accordingly received sentence of death, but he was not executed; and the prisoner, *Parkes*, was discharged.

1797.

CASE CCC.

THE KING *against* MARGARET KENNEDY.

A privately stealing from a person rendered senseless by intoxication, is not within the capital part of the statute of 8 Eliz. c. 4.

S. C. 2 East, 706.

AT the Old Bailey in January Session 1797, *Margaret Kennedy* was tried before MR. JUSTICE LAWRENCE, present THE LORD CHIEF BARON, for stealing, on the 22d December 1796, two guineas and a half, three shillings, and part of a copper button plated with silver, of the value of one penny, the property of *Richard Gammond*, privately from his person.

THE prosecutor was a gentleman's coachman; and being intoxicated, was prevailed on by the prisoner, who was a woman of the town, to go into a house in *Dyott-street*, *St. Giles's*. During his stay in this house he fell asleep; and awaking about an hour afterwards, found that his pockets had been rifled of the property laid in the indictment. The prisoner did not feel any hand in his pocket, nor had he any perception whatever of the larceny at the time the money was taken away. The property was found immediately afterwards in the mouth of the prisoner, and while she was attempting to swallow it.

IT was contended on the part of the prisoner, on the authority of the cases of *Rex* v. *Gribble* (1), and *Rex* v. *Mary Reading* (2), that where the prosecutor has, by intoxication, deprived himself of that vigilance by which he might have protected his property, a privately stealing from his person, under such circumstances, is not within the statute; for

(1) *Ante*, page 240. Case 120.

(2) *Ante*, page 590. Case 264.

1797.

KENNEDY'S CASE.

that the distinction is, as appears by the cases of *Rex* v. *Thompson* (1), and *Rex* v. *Willan* (2), that where property is stolen privately from a person taking his natural rest, as where the captain of a vessel had fallen asleep in his cabin, and where a waggoner was sleeping in the stables while his horses were feeding, the offender was guilty of a capital offence (*a*), but not where the sleep was the effect of intoxication: and the case of *Rex* v. *Elizabeth Duff*, a girl of the town, who was indicted before MR. JUSTICE BULLER, in June Session 1796, and acquitted of the capital part of the charge, on its appearing that the prosecutor, *Andrew Lindburgh*, a drunken Swede, had picked her up in the streets, and fallen asleep at her lodgings, during which time she rifled his pockets and ran away, was mentioned as a case determined on this distinction.

(1) *Ante*, page 443. Case 205.

(2) *Ante*, page 495. Case 236.

THE Jury found the prisoner guilty of the whole charge in the indictment, *viz.* of having stolen the property *privily from the person* of the prosecutor; and she received judgment to die according to law; but the execution of the sentence was respited, and the case referred to the opinion of THE TWELVE JUDGES, on a question, Whether the prisoner was, under the circumstances of this case, liable to the capital punishment inflicted by the 8 Eliz. c. 4.

THE JUDGES were of opinion, that the prisoner ought to have been acquitted of the capital part of the charge, there having been no fraud used by the prisoner in making the pro-

(*a*) At Maidstone Summer Assizes 1787 one *Huckley*, or *Stuckley*, was indicted before MR. SERJ. KEMP, who went the Circuit for LORD MANSFIELD, for privately stealing a watch from the person of one Charles Wager, a seaman, who, on being unable to procure a lodging, had laid himself down on a bulk in the street, about half past one o'clock in the morning and fallen asleep, during which time the prisoner had stolen his watch without his perceiving it: and on its being objected that the 8 Eliz. c. 4. did not extend to the cases of persons asleep, the point was referred to MR. JUSTICE GOULD, who was clearly of opinion, that as the situation of the prosecutor was occasioned by the necessity of finding some place of rest on being disappointed in his endeavours to procure a lodging, the prisoner was guilty of the capital part of the charge. MS.—But see now 48 Geo. III. c. 129. s. 2. by which the statute of 8 Eliz. c. 4. is repealed.

1797.

KENNEDY'S CASE.

secutor drunk, but he having fallen into that state by his own default; and therefore that this case was distinguishable from the case of *Rex* v. *Branny* (1), where the prosecutor had been made insensibly drunk by the artifices of the prisoner, for the very purpose of stealing his money unperceived, and who was therefore held to be within the statute; for his whole conduct was *in fraudem legis.* In consequence of this opinion, the prisoner received, before the ensuing Session, a pardon, on condition that she was fined one shilling, and imprisoned twelve months in the house of correction; which sentence was executed accordingly (*a*).

(1) 2 East, 705. and *ante*, page 241, *notii.*

(*a*) *Thomas Morris* was indicted at the Old Bailey in April Session 1798, on this statute, for privately stealing a silver watch from *William Brooks*, on the 3d October 1797; and it appearing that *Brooks* had fallen asleep, through the effects of intoxication, at a public-house at *Enfield*, during which time the prisoner had taken the property without his perceiving it, he was, on the authority of the above case, acquitted of the capital part of the charge.

CASE CCCI.

THE KING *against* RICHARD FULLER.

An indictment on the statute 37 Geo. III. c. 70. for seducing soldiers, need not set out *the means* used for that purpose, nor aver that the prisoner *knew* the person endeavoured to be seduced *to be a soldier;* and it seems that it may, without repugnancy, charge the double act, that he endeavoured to incite the soldier to commit *mutiny*, AND ALSO to incite him to commit *traitorous practices.* S. C. 1 East, 92.

AT the Old Bailey in July Session 1797, *Richard Fuller* was tried before MR. JUSTICE BULLER, on the statute 37 Geo. III. c. 70. which, after reciting, that "divers wicked and evil-disposed persons, by the publication of written or printed papers, and by malicious and advised speaking, had of late industriously endeavoured to seduce persons serving in his Majesty's forces by sea and land from their duty and allegiance to his Majesty, and to incite them to mutiny and disobedience," ENACTS, "That any person who shall maliciously and advisedly endeavour to seduce any person or persons serving in his Majesty's forces by sea or land from his or their duty and allegiance to his Majesty, or to incite or stir up any such person or persons to commit any act of mu-

tiny, or to make, or endeavour to make, any mutinous assembly, or to commit any traitorous or mutinous practices whatsoever, shall, on being legally convicted of such offence, be adjudged guilty of felony without benefit of clergy."

THE indictment consisted of two counts. The first count stated, that *Richard Fuller*, after, &c. being a wicked and evil-disposed person, to wit, on the 8th June 1797, feloniously did maliciously and advisedly endeavour to seduce one *Matthew Lowe*, he the said *Matthew Lowe* then and there being a person serving in his Majesty's forces by land, from his duty and allegiance to his said Majesty, against the form of the statute, and against the King's peace, his crown and dignity.

THE second count stated, that he feloniously did, maliciously and advisedly, endeavour to incite and stir up the said *Matthew Lowe*, he the said *Matthew Lowe* then and there being a person serving in his said Majesty's forces by land as aforesaid, to commit an act of mutiny, and to commit traitorous and mutinous practices, against the form of the statute, and against the King's peace.

THE prosecutor, *Matthew Lowe*, was a private in the Coldstream Regiment of Guards, to which he had belonged between four and five years, and had conducted himself during that period with exemplary attention to the duties of his profession. The prisoner was a militia man for the county of *Bucks*; had formerly followed the trade of a shoemaker; and appeared not to possess the best of characters. *Lowe*, on the day laid in the indictment, was going from his house in *Swan's Rents*, near *York-street*, to the *Rose and Crown* public-house on *Kew Green*, where he was then quartered. The prisoner overtook him near the *Packhorse* at *Turnham Green*; and, looking earnestly in his face, said, "*Do you belong to the military?*" On being answered in the affirmative, he said, "I also belong to the *Buckinghamshire* Supplementary Militia;" and he invited *Lowe* to drink a pint of beer with him. They accordingly went into the tap-room of the *Packhorse*; and after some introductory conversation, the

1797.

FULLER'S CASE.

prisoner produced to him several inflammatory and seditious hand-bills, intitled, "Soldiery," and calculated to incite the army to mutiny; saying, at the same time, that they were true copies of every man's heart that wished his country well. *Lowe* felt all the indignation of a true and honest soldier at this base attempt to render him treacherous to his King and Country; and in order to apprehend the offender with greater safety, induced him to walk with him to his quarters at *Kew Green*, where meeting with a comrade, they gave information to their Serjeant, and the prisoner was, after repeating his attempts to seduce, not only *Lowe*, but his comrade and the Serjeant, taken into custody.

THE Jury found the prisoner GUILTY.

GURNEY, *for the prisoner*, submitted three objections in arrest of judgment.

FIRST, That the indictment ought to have stated *the means* by which the prisoner had endeavoured to seduce *Matthew Lowe* from his duty and allegiance, as charged in the first count, and to incite him to commit an act of mutiny, and traitorous and mutinous practices, as charged in the second count.

SECONDLY, That it should have been averred in the indictment that the prisoner *knew* that *Matthew Lowe* was a soldier.

THIRDLY, That the second count of the indictment comprehended two distinct offences, *viz.* an endeavour to seduce, entice, and stir up *Matthew Lowe* to commit mutiny, AND ALSO an endeavour to seduce, entice, and stir up the said *Matthew Lowe* to commit traitorous and mutinous practices.

THE learned JUDGE who tried the prisoner saved these points for the consideration of THE TWELVE JUDGES; and they were argued in the Exchequer Chamber in Michaelmas Term 1797, by GURNEY *for the prisoner*, and ABBOTT *for the Crown*; and, at the Old Bailey Session in December 1797, MR. BARON PERRYN delivered the opinion of the JUDGES.

GURNEY, as to THE FIRST OBJECTION, argued as follows:

1797.

FULLER'S CASE.

—The statute recites, that the mischief intended to be prevented was the endeavouring to seduce persons from their allegiance "by the publication of written or printed papers;" AND "by malicious and advised speaking." The mode, therefore, by which one person endeavours to seduce another from his allegiance constitutes a part of the description of the offence. In the present case the offence is said to have been committed by the publication of printed papers, namely, by publishing and delivering two seditious hand-bills to *Matthew Lowe*: those hand-bills, therefore, ought to have been set out in the indictment, for they are the instruments by which the act was done that constitutes the endeavour to seduce. The indictment, in its present defective form, does not furnish the prisoner with sufficient notice of the specific charge which he has to encounter; it is too general; it merely charges, that he endeavoured to seduce *Matthew Lowe* from the duty of his allegiance; but it ought to have stated the means by which that endeavour was made. The prisoner may have supposed that the evidence against him would consist of conversation, and have been only prepared to repel that, when, in fact, it consisted of the publication of papers which he was not prepared to repel; or, on the contrary, he may have been prepared to meet evidence of publication of papers, and have been surprised by evidence of conversation. Possibly, also, the Grand Jury may have found the bill on evidence of malicious and advised speaking, and the Petty Jury have given their verdict on evidence of the publication of seditious papers, and so the prisoner may have been deprived of the advantages of having had the concurrent opinion of the two Juries. Indictments on other charges have been quashed for uncertainty analogous to that which prevails in the present indictment. In the case of *Rex* v. *Munoz* (1), and in many other cases of indictments for frauds on the statute of 33 Hen. VIII. c. 1. it is clearly decided, that it is not sufficient merely to pursue the words of the Act, and aver that the defendant "did falsely and deceitfully obtain possession of money, &c. by means of a false token;" but the indictment must state what false token he employed for

(1) 2 Stra. 1127.

1797.

FULLER'S CASE.

that purpose; and in the case of *Rex* v. *Mason* (1), the same rule has, on the same principle, been laid down, in the case of indictments on the statute 30 Geo. II. c. 24. for obtaining money or goods by false pretences. It is said by *Hawkins* (2), "That an indictment finding that a person hath feloniously broken prison, without shewing the cause of his imprisonment, &c. by which it might appear that it was of such a nature that the breaking might amount to felony, is insufficient." Also, indictments against persons for refusing to be sworn constables, after they had been *legitimo modo electi*, have been quashed, for not shewing the manner of the election, that it might appear to have been such as obliged the defendants to have undertaken the office. In the case of *Davy* v. *Baker* (3), which was an action upon the statute 2 Geo. II. c. 24. for preventing bribery and corruption in the election of Members of Parliament, and which enacts, that "if any person shall ask, receive, or take any money, or other reward, he shall forfeit 500*l.* and be disabled to vote at any election;" it was on a motion in arrest of judgment objected, that the charge was too loose and general, *viz.* that the defendant "did receive a gift or reward," without specifying what he received or took as a reward, whether money, or what particular species of reward, and that, therefore, the defendant could have no notice to make his defence; and the Court was of opinion, that being on a criminal charge, the declaration was bad, inasmuch as it was not laid with sufficient certainty.

(1) *Ante*, page 487. Case 224.

(2) Bk. 2. ch. 25. s. 57.

(3) 4 Burr. Rep. 2471.

ABBOT, *for the Crown*, argued, That no indictment could be framed so as to make it tally with the evidence, if it were necessary in cases of this sort to state the means employed for the perpetration of the offence. The case of *Rex* v. *Munoz* is the only case that has been decided on the statute 33 Hen. VIII. c. 1. and on this decision the case of *Rex* v. *Mason* was founded. The preamble of the 33 Hen. VIII. c. 1. recites "That many evil-disposed persons had unlawfully obtained goods, chattels, and jewels, of other persons, by means of *privy tokens*," and enacts, "That whoever shall obtain any thing by colour and means of any such *false tokens*, he shall,

1797.

FULLER'S CASE.

&c." and the indictment in *Rex* v. *Munoz* having mentioned only *false tokens*, was clearly bad, inasmuch as it omitted a material word; for an indictment is bad which is more comprehensive than the meaning of the statute, even though it pursues the words of it (1). The same observation will apply to the case of *Rex* v. *Mason*; for it is not every kind of false pretence that is within the statute 30 Geo. II. c. 24. as appears by the opinion of LORD KENYON in the case of *Rex* v. *Young* (2). But there can be no supposable case of *an endeavour* to incite a soldier to mutiny that is not within the statute on which the present indictment is founded. The case of *Davy* v. *Baker* does not apply to the present case; for there the declaration stated, that the defendant had received "a gift *or* reward;" and the Court was of opinion that it ought to have averred which of the two it was: and as to the case of *Rex* v. *Harper*, on an indictment for refusing to perform the office of constable, the law requires the manner of the election to be shewn, because no forfeiture can arise except on a lawful election. The words "mutiny" and "mutinous and traitorous practices," used in 37 Geo. III. c. 70. are taken from the statute 22 Geo. II. c. 33. for the amendment of the statutes relating to the navy, and from the annual mutiny act, and the articles of war, which make those offences punishable with death in soldiers and sailors. In the statute 37 Geo. III. c. 70. the Legislature appear to have studiously selected the word "endeavour," as being of the largest and most general import; and they have not mentioned any particular modes of attempt, or circumstances accompanying the attempt, as necessary to constitute the crime; and the circumstance of the preamble having said "by the publication of written or printed papers," and "by malicious and advised speaking," will not make any difference; for it appears by the opinion of the JUDGES, delivered in the case of *Rex* v. *Robinson*, at the Old Bailey in June Session 1796, that the body of this statute is not to be restrained by the preamble, as it has no reference to it, but that it is rather to be extended to all cases within the mischief. To determine the offence laid in this indictment by the word

(1) 2 Hawk. P. C. ch. 25. s. 111.

(2) *Ante*, page 505. Case 232.

Ante, page 749. Case 294.

1797.

FULLER'S CASE.

"endeavour," not to be the offence mentioned in the statute, would be to alter the statute, and not to construe it. The word "endeavour" clearly implies an act done, and holds a middle place between the compassing and the actual perpetration; it describes the attempt to carry the operation of the mind into effect. There are many cases where the description of the offence has been quite as general as it is in the present case, and the indictment been held good. In an indictment for a conspiracy, which is an offence known to the law *eo nomine*, it is not necessary to state the means employed to effect it (1). So in cases of subornation of perjury, though most of the old precedents state a promise of money (2), yet most of the modern ones state the endeavour to suborn (3). In the case of *Rex* v. *Tilley*, the indictment, which was on the statute 16 Geo. II. c. 31. charged, that he and others were "aiding and assisting" *Isdaile Idswell* to attempt to make his escape from THE NEW PRISON in *Clerkenwell*; and it was objected, that it was defective, inasmuch as it did not state that *Isdaile* did escape; but as to this point of the case it was holden to be sufficient (4). It is sufficient, in charging an accessary before the fact to say, "that he did incite, move, procure, aid, and abet" (5). In an indictment on the statute 23 Geo. III. c. 13. for enticing artificers to go out of the kingdom, it is sufficient merely to pursue the words of the statute (6). So in indictments for forgery, although the means by which the fraud is committed may be various, it has been held, in the case of *Rex* v. *Powel* (7), that it is sufficient to aver a general intent to defraud.

(1) Rex v. Stirling, 1 Leo. 125. Rex v. Kinnersley, 1 Stra. 193.

(2) Tremaine, P. C. 168. 174.

(3) Cro. Cir. Comp. 586. Cro. Cir. Assistant, 329.

(4) But see the Case, *ante*, page 662. Case 281.

(5) Sancher's Case, 9 Co. 116.

(6) Rex v. Middleton, 6 Term Rep. 739.

(7) *Ante*, page 77. Case 43.

MR. BARON PERRYN, as to this objection, *viz.* that the indictment does not state by what manner and by what means the prisoner endeavoured to seduce, entice, and stir up *Matthew Lowe* from his duty and his allegiance, said that the Judges were unanimously of opinion that the case has no analogy to cases of indictments for fraudulently procuring monies or goods by means of false tokens, but that it is like the cases of indictments for conspiracies, where the offence is held to be sufficiently described by the words "conspire, maintain, aid, and abet," without shewing by what manner and by

1797.

FULLER'S CASE.

what means the conspiring, maintaining, aiding, or abetting, were produced, and that as an endeavour to seduce, to entice, and to stir up, is a conclusion of fact arising from a variety of circumstances, which in itself is not capable of any precise definition or description, the fact is fully and only capable of being expressed by the word "endeavour."

GURNEY on the second objection argued, that it never could be the intention of the Legislature to punish an act of this kind with death, unless the man who was guilty of it *knew* that the person whom he was endeavouring to seduce or incite came within the meaning of the statute; and therefore the indictment ought to have averred that the prisoner *knew Matthew Lowe* to be a person serving in his Majesty's forces by land. If it should be thought that a feeble presumption repels this objection as far as regards the second count, because it may be said, that a man could not be incited to an act of mutiny who was not in his Majesty's military or naval service, and *known* to be so by the prisoner; yet the first count, which only charges an endeavour to seduce *Matthew Lowe* from his duty and allegiance to his Majesty, affords no presumption of that kind. Allegiance is equally due from all subjects, and therefore the prisoner may have done all that is charged in this count, without knowing *Matthew Lowe* to be a soldier. However, even as to the second count the objection is fatal; for in capital cases, the want of specific averments is not to be supplied by implication. The word "advisedly," means nothing more than deliberately, and cannot be held equivalent to the word "knowingly."

ABBOTT, *for the Crown.* It is stated in both counts, that the prisoner did *advisedly* endeavour to seduce or stir up *Matthew Lowe*, being a soldier. Now the word "advisedly" is at least of as strong import as the word *scienter*, and that has been held sufficient in similar cases. In the case of *Rex* v. *Thompson* (1), the indictment charged that the defendant did *knowingly* receive and harbour divers robbers, to the Jury unknown, and on a writ of error it was contended, that *scienter recepit* was not good, but that it ought to have been,

2 Hawk. P. C. c. 25. s. 67.

(1) 2 Lev. 208.

1797.

FULLER'S CASE.

that the defendant, knowing them to be robbers, received them; but the Court said, that *scienter* had been lately ruled good in one *Sally's Case*, and the judgment was affirmed. So in *Lady Lawley's Case* (1), who was convicted on an information for attempting to persuade a witness not to appear and give evidence against *Japhet Crooke* for forgery, it was objected, in arrest of judgment, that it was not positively averred that *Crooke* was indicted, it was only said, that she knowing that *Crooke* was indicted, and was to be tried, did so and so; but the Court, on consideration, held it well enough. So in the case of *Rex* v. *Tilley*, where the indictment charged that the prisoner was aiding and assisting to one *Idswell* in an attempt to make his escape, it was held a sufficient averment of *Idswell*'s having attempted to escape (2); and in indictments for seducing artificers, it is never usual to aver that the defendant *knew* that the person seduced was an artificer (3).

(1) Stra. 904.

(2) But see the Case, *ante*, page 662. Case 281.

(3) Rex v. Middleton. 6 Term Rep. 379.

Mr. Baron Perryn, as to this objection, *viz.* that it ought to have been averred that the prisoner knew that *Matthew Lowe* was a soldier, said, the Judges are of opinion that knowledge is necessarily included in the charge that he endeavoured to seduce, &c. but as a more full and satisfactory answer, they are of opinion that the word *advisedly* in the indictment is equivalent to the word *knowingly*, and of course renders the objection groundless.

Gurney, on the third objection, argued, that this statute creates four distinct offences. First, Endeavouring to seduce a person serving in his Majesty's forces by sea or land from his duty and allegiance. Secondly, Endeavouring to incite such person to an act of mutiny. Thirdly, Endeavouring to incite him to make, or endeavour to make, a mutinous assembly. Fourthly, Endeavouring to incite him to commit any traitorous or mutinous act. The second count contains two of these offences, and each of them ought to have been charged in a separate count, for if it be good with two, it would be good with the whole four, or even with forty, if the statute had created so many, or any other given number, however inconsistent they might be, which is

absurd. Besides, this is a case in which the Judges will hold the Crown to a strict definite mode of charge, more so even than in the cases cited, as this is a capital felony; perhaps more so still because this is a temporary statute, and a measure of extraordinary rigour. 1797. FULLER'S CASE.

ABBOTT, *for the Crown.*—Each of the four offences which this statute is described to contain, is clearly felony. But suppose the prisoner had endeavoured to incite *Matthew Lowe* to all the acts mentioned in the statute, and that such endeavour had been at one and the same time, in that case, as far as the prisoner was concerned, his act would have been single, for the subsequent conduct of the person incited is a distinct consideration. The prisoner is not charged as an accessary to any offence before committed, but only with an endeavour to incite to the commission of some future offence. If the endeavour was but one act, and it must be so taken now, the indictment is right, for it cannot charge the offence more accurately than it took place. If the act was general, it cannot be made particular by the indictment. It is no objection, after verdict, that an indictment contains several felonies, if each is distinctly charged. In the case of *Rex* v. *Young* (1), it is true, that the offences were charged in different counts, but the doing so is only matter of convenience. This was but one endeavour constituting but one act.

(1) 3 Term Rep. 98. *ante*, page 505. Case 232.

MR. BARON PERRYN said, that probably it would be found to be a sufficient answer to this objection, that (though this charge might have been branched out into separate offences) the whole may be but the parts of one fact of endeavour, which must be stated as it is. But under the circumstances in which the prisoner stands convicted upon the first count of this indictment, to which no sufficient objection has been taken, and upon which, therefore, judgment must be pronounced against him, it is not absolutely necessary that the Judges should decide upon this objection, and therefore I forbear to enter further into the consideration of it.

THE judgment was accordingly affirmed, and sentence passed upon the prisoner.

1797.

CASE CCCII.

THE KING *against* ROBERT HARRIS.

An indictment for perjury, laying the offence to have been committed "at *the* "*Guildhall* of "the city of "*London*," is bad; for *the venue* must be laid in some *parish* or *ward*.

AT the Old Bailey in September Session 1797, *Robert Harris* was tried before JOHN SILVESTER, Esq. *Common Serjeant* of the city of London, for wilful and corrupt perjury, and was convicted upon very full and satisfactory evidence.

THE indictment stated, "That at the Sittings of *Nisi Prius*, holden at *the Guildhall* of the city of *London*, in and for the said city of *London*, after the Term of Easter, on the 9th day of June, in the 37th year, &c. before the Right Honourable LLOYD LORD KENYON, then Chief Justice, &c. a certain issue, &c. came on to be tried in due form of law, &c. and that *Robert Harris* appeared as a witness for the plaintiff, and *then and there* took his corporal oath, &c. &c. and that being so sworn as aforesaid, &c. then and there, to wit, on the said ninth day of June, in the thirty-seventh year aforesaid, at *the Guildhall* aforesaid, in the city of *London* aforesaid, falsely, wickedly, wilfully, and corruptly, &c. did, &c. and so the Jurors aforesaid say, that the said *Robert Harris*, on the said ninth day of June, in the thirty-seventh year aforesaid, at the said *Guildhall* of the city of *London*, &c. did falsely, wickedly, wilfully and corruptly, commit wilful and corrupt perjury."

THE prisoner was convicted. But

GURNEY moved in arrest of judgment.—The only *venue* that is stated in this indictment is, "THE GUILDHALL of the city of *London*;" but *The Guildhall* is not a place from whence a Jury can be summoned, and therefore cannot be laid as a *venue* in an indictment; and an indictment is bad if the place alleged be not such from whence a *venue* may come (1). The *Guildhall* of the city of *London*, it is true, is a known place, but it is neither a parish nor a vill, and it has been the constant usage of pleading to shew the ward and parish in which a fact alleged in *London* was done (2). In the case of *Forth* v. *Harrison* (3), in debt on a bond conditioned for the payment

(1) 4 Hawk. P. C. ch. 25. s. 83.

(2) 4 Hawk. P. C. ch. 23. s. 92.

(3) Cro. Eliz. 732.

1797.

HARRIS'S CASE.

of 100*l.* at the plaintiff's house in *Cheapside*, the defendant pleaded that he had paid the same at the plaintiff's house in *Cheapside*, according to the form and effect of the condition, and concluded to the country, to which the plaintiff demurred because there was not any parish or ward mentioned where the said house should be, so that if issue were taken there could not be any *venue*; and on a writ of error being afterwards brought, the plea was held to be bad for this cause, for that it ought of necessity to be alleged in what parish or ward the house was situated for the trial; as when payment is alleged at a house in the country, it ought to be stated in what vill it is situated, for the *venue* to have a trial (1), and a parish and ward in *London* are as a vill or hamlet in other counties. In the case of *Normanville* v. *Pope* (2), in debt upon a bill of 40*l.* to be paid within ten days after *John Lepton* went by five days undivided from *London* to *York*, and returned from *York* to *London*, it was alleged that on such a day he went from *London* to *York*, and by five days undivided went from *York* to *London*, and from *London* to *York*; and on a motion in arrest of judgment, an exception was taken because it was not alleged to what parish in *London* he returned, but to *London* generally, for that it ought to have been to a parish from which a *venue* might come, and for this cause all the Court held the declaration to be bad. In the case of *Clison* v. *Proctor* (3), in error on a judgment in the Court of Common Pleas, one of the errors assigned was that the *venire facias* was awarded *de vicineto civitatis Coventrice*; but the Court held it to be well enough, for that in all places, except in *London*, no mention is made of the parish or ward; and in the case of *Forth* v. *Harrison*, before cited, the officers of both the Courts of King's Bench and Common Pleas, certified that their course always had been to plead an act done in *London* to be done at such a parish and ward, for the *venue*: these cases, and the principle upon which they were decided, are recognized by *Hawkins* in his Pleas of the Crown (4). In *Mackally's Case* (5), which was the case of an indictment tried in this Court, for killing one of the Serjeants at Mace in *London*; one exception was,

(1) 7 Hen. 6. pl. 36.
(2) Cro. Jac. 137, 150.
(3) Cro. Jac. 307.
(4) 3 Hawk. ch. 23. s. 92.
(5) 9 Co. 66.

1797.

HARRIS'S CASE.

that the record stated "that on such a day, in the Court of the Lord the King, before *Richard Pigot*, Alderman, then, and as yet, one of the Sheriffs of the city of *London* aforesaid, in his Compter, situate in the parish of *St. Michael*, in *Wood-street*, in *London* aforesaid, according to the custom of the city aforesaid then holden, one *Robert Radford* had levied a plaint, &c." without shewing in what ward the parish was; and the Court, on the authority of the *Year-Book*, 7 *Hen.* 6. *pl.* 36. *b.* where an indictment in the parish of *St. Lawrance* in the *Jewry* was awarded good, though it omitted the ward, held the allegation to be sufficient, for that every ward in *London* is as a hundred in a county, and every parish in *London* as a town in a hundred, and it is not necessary to declare in what hundred a town is situate, no more than in what ward a parish is situated, for the ward is only added because there are divers parishes in *London* of one and the same name, and the ward is added to make a distinction of one parish from another; but it is clear from this determination, that even stating a parish generally is not sufficient, but it must be stated with some distinguishing addition, as in the parish of *St. Michael* "in *Wood-street*," or in the parish of *St. Lawrance* "in the *Jewry*." But in the present case they have not stated in any way either the parish or the ward, but have said, "at *the Guildhall* of the city of *London*" only.

KNOWLYS, *for the Crown*, replied, and contended on the authority of *Hawkins*'s Pleas of the Crown (1), that a *venue* may come not only from a town, a ward, a parish, a hamlet, a borough, or a manor, but even from a castle, a forest, or any other known place. In the case of *Conniston* v. *Hare*, in the Exchequer, it was adjudged that a *venire facias* may be awarded from a castle (2). It is also said by *Roll*, in his Abridgment, that if a thing be alleged in a manor, the *venue* may be *de manerio*, because a manor is a place known, and has a certain name (3); a *venue* from the scite of a manor has been held good (4); a *venue* therefore may surely be well laid at *the Guildhall* of a town, for the guild of a town is a place as certain and as clearly denominated as a manor, and descriptive of much more certainty than a castle. *Lord Hale* (5)

(1) 3 Hawk. ch. 23. s. 92.

(2) 2 Roll. Abr. 618.

(3) Co. Lit. 125. b.

(4) 2 Roll. Abr. 618.

(5) 2 Hale, P.C. 262.

says, if a murder be alleged *apud civitatem Bristol*, the *venire facias* is most properly *de Bristol*, and it is good, because a city; but if it be from a place not a city, it must be *de vicineto de D.*(1); but though it be a city, the *venire facias de vicineto civitatis Bristol* is good, though it be also a county, as hath been often resolved against the opinion of *Sir William Staundforde* (2). 1797.

HARRIS'S CASE.

(1) 7 Hen. 4. 13.

(2) S. P. C. Lib. 3. c. 4. fo. 154.

THE prisoner was committed, and the point reserved for the consideration of the Judges.

THE case was argued in the Exchequer Chamber, in Michaelmas Term 1797, by GURNEY for the prisoner.

MR. BARON HOTHAM, in October Session 1798, ordered the prisoner to the bar, and after stating the case, said the Judges had taken this point into their consideration, and deliberately examined all the precedents in former, as well as later times; that it appeared in all of them that the indictment had aways laid the perjury to have been committed either in some parish or ward within the city of *London*, and that, as that had not been done in the present case, they were unanimously of opinion that the indictment was defective, and that the prisoner must be discharged.

AND he was discharged accordingly.

THE KING *against* NICHOLAS BRADY.

CASE CCCIII.

AT the Old Bailey in September Session 1797, *Nicholas Brady* was tried before MR. JUSTICE ASHHURST, for assaulting *Charles Wakeley*, an officer of excise, in the execution of his duty.

The statute 24 Geo. III. c. 47. s. 15. extends to *excise officers* as well as to *custom-house officers* and *officers* of the *navy*.

S. C. 1 Bos. & Pull. 187.

THE indictment consisted of three counts. The FIRST COUNT charged, "That *Nicholas Brady*, *John Kierman*, and *Owen Rooke*, on the 21st April 1795, with force and arms, at the liberty of *Havering Alte Bower*, in the county of *Essex*, in and upon *Charles Wakeley*, then and there being an officer of our Lord the King, in the service of the excise of our said Lord the King duly constituted and appointed, and then

1797.

BRADY'S CASE.

and there being *on shore* in the due execution of his office and duty as such officer aforesaid, in seizing and securing, to and for the use of our said Lord the King, a large quantity, to wit, 500 pounds weight of sope, which said sope was then and there liable to be seized by the said *Charles Wakeley*, as such officer as aforesaid, and then and there being in the peace of God, &c. of our said Lord the King, unlawfully and violently did make an assault, and him the said *Charles Wakeley*, so being then and there *on shore* in the due execution of his said office and duty in manner aforesaid, unlawfully and forcibly did hinder, oppose, and obstruct, to wit, at the liberty of *Havering Atte Bower* aforesaid, in the said county of *Essex*; and other ways, &c. to the great damage, &c. in contempt, &c. to the evil example, &c. against the peace, and also against *the form of the statute* in such case made and provided." The SECOND COUNT charged the defendants with having assaulted *Wakeley*, an officer of the excise, then and there being *on shore* in the execution of his duty; and the THIRD COUNT charged, that they had hindered, opposed, and obstructed him, he then and there being an officer of the excise, and *on shore* in the due execution of his duty.

CHARLES WAKELEY had been employed in different departments of the excise during a period of seven years; and on the 20th April 1795, went, at about 11 o'clock at night, to the house of Mr. *Owen Riley*, a sope-boiler at *Collier's-row* near *Rumford*, in *Essex*, in company of Mr. *Wright*, the excise officer who surveyed the premises, to inspect the boiling, where they discovered *John Kierman* and *Owen Rooke* removing sope from the copper into a cart, and three other persons, of whom *Brady* was one, assisting them; but, on their attempting, at about four o'clock of the morning of the 21st April, to seize the sope, they were most violently assaulted and prevented from so doing by the three defendants, particularly by *Brady*. Neither the prosecutor *Wakeley*, nor the surveyor *Wright*, had any *warrant* from a magistrate to search the premises, nor had they any constable or other peace officer with them.

THE indictment was framed upon the statute of 24 Geo. III.

c. 47. s. 15. which is intitled "An Act for the more effectual prevention of *smuggling* in this kingdom," and which after reciting, "that the laws to prevent the clandestine importation and running of prohibited goods, and goods liable to the payment of duties into this kingdom, were insufficient; and that the pernicious practice had greatly increased, and been carried on by large armed vessels at sea, and by numerous gangs of smugglers upon land, with great violence, to the prejudice of the revenue, the detriment of the fair trader, and the endangering of the lives of the officers of the revenue, ENACTS, "That if any officer or officers of his Majesty's navy, or in the service of the customs, or excise, being *on shore* or going on board, or being on board, or returning from on board any ship, boat, or vessel, within the limits of any of the ports of this kingdom, or within four leagues from the coasts thereof, shall be hindered, opposed, obstructed, or assaulted, in the due execution of his or their office or duty, by any person or persons whatsoever, either in the day time or night, all and every person or persons so hindering, opposing, obstructing, or assaulting, the said officer or officers, in the due execution of his or their duty, and all such as shall act in his or their aid or assistance, shall be sentenced to hard labour on the river Thames, or other navigable river in *England*, for any term not exceeding three years, pursuant to 19 Geo. III. c. 74."

SERJEANT RUNNINGTON, Counsel for the defendant, took three objections.

FIRST, That this is not an offence within the meaning of the statute 24 Geo. III. c. 47.; this being an offence on the statutes of 10 Ann. c. 19. s. 15. and the 24 Geo. III. c. 48. s. 10. against the *excise laws*, and not on the 24 Geo. III. c. 47. which was expressly made to prevent *smuggling*.

SECONDLY, Supposing, for the sake of the argument, that the statute 24 Geo. III. c. 47. attaches upon the facts proved, yet the prosecutor was not in the due execution of his duty, inasmuch as he had no warrant, which the statutes of 23 Geo. II. c. 21. s. 34. and 5 Geo. III. c. 43. s. 20. require (*a*).

(*a*) On the argument in the Exchequer Chamber, LORD KENYON, C. J.

1797.

BRADY'S CASE.

THIRDLY, That the statute 24 Geo. III. c. 47. s. 15. is virtually repealed, as to the subject of this seizure, by the subsequent statute 24 Geo. III. c. 48. s. 10.

See the arguments in Bosanquet and Puller's Reports, 188.

THE prisoner was found GUILTY, and the case reserved for the opinion of THE TWELVE JUDGES; and it was argued in the Exchequer Chamber in Michaelmas Term 1797, by RUNNINGTON for the prisoner, and KNOWLYS for the Crown.

MR. JUSTICE GROSE, in the December Session following, delivered the opinion of the JUDGES as follows: This is an indictment on the statute 24 Geo. III. c. 47. s. 15. which is obviously intended not only to prevent smuggling, but to protect every branch and department of the revenue; for it recites, that it was intended to suppress practices that were carried on to the prejudice of the revenue and the detriment of the fair trader, and to the endangering of the lives of the officers of the revenue, and after various clauses relating to the revenue, protects those whose duty it is to preserve and collect it. The words are, "any officer or officers of the navy, or in the service of the customs or excise, being on shore, &c.;" and therefore these are the persons intended to be protected, and indeed *excise officers* are expressly named. The situation in which these officers are to be protected, is "being on shore, or going on board, or being on board, or returning from on board, any ship, boat, or vessel, within the limits of any of the ports of this kingdom, or within four leagues from the coast thereof;" and these different situations must necessarily include the several descriptions of persons before named, *viz.* officers in the navy, the customs, or *the excise*. The time when these persons are not to be obstructed is when they are "in the due execution of their duty, either in the day time or night." The first question, therefore, is, whether *Charles Wakeley*, the excise officer who was obstructed, was upon the present occasion in the due execution of his duty, within the meaning of this Act of Parliament. It was contended by the Counsel for the prisoner, that this statute was not intended by the Legislature to ex-

EYRE, C. J. and MACDONALD, C. B. are said to have expressed themselves very clearly, that this point could not be supported. Bosanquet and Puller's Reports, 189.

tend to officers in the execution of their duty when *on land*, and that the words, "being on shore," were referable only to officers of the customs, when exercising their duty near the sea, and not to officers of the excise, for that the Act, both from its preamble and enacting clauses, was evidently made to prevent *smuggling*; that is, that it was made to secure the revenue collected by means of *the customs*, but did not meddle with that part of the law that secures the collection of the revenue by means of *the excise*. But the JUDGES are all of opinion, that the general words in the enacting clause are not to be restrained by the preamble; that they are to be construed according to their general import; and that the intention of the Legislature was, that all officers of the *navy*, the *customs*, or the *excise*, acting in the execution of their respective duties, whether they are so acting on land, or on the sea within the limits and under the circumstances described in the statute, are within the protection of this clause; and that they are so protected, as well while they are duly engaged in preventing smuggling, by seizing uncustomed goods, as while they are protecting the excise, by securing the duties on sope, or any other excised commodity, by which the public revenue may be increased; for any other construction of these words would not only violate the rules of construction by putting a forced meaning on the words, but entirely defeat the intention of the Legislature, who were anxious by this statute to put an end to all the mischiefs that prejudiced the revenue; of which mischiefs the clandestine removal of sope is undoubtedly one. MR. KNOWLYS, in arguing this case in the Exchequer Chamber on behalf of the Crown, very properly observed, that the words of this statute, "officers of the customs or excise, in the due execution of their duty, &c." included the whole range of that duty which belonged to excise officers before the passing of the Act; that the 10 Ann. c. 19. s. 19. having empowered officers to seize sope, this duty was then known to the Legislature; that the words "being on *shore*" are equivalent to the words "being on *land*," and that the excise is an inland duty on shore. This mode of construing these words is fortified by

1797.

BRADY'S CASE.

the circumstance of excise officers being expressly named in the Act, for it shews that it was the intention of the Legislature that the Act should be so construed; for if the construction which MR. SERJEANT RUNNINGTON contended for, in favour of the prisoner, was adopted, namely, that the statute was intended to protect *custom-house officers* only, it would be difficult, and, indeed, impossible, to account why the words "*excise officers*" were introduced at all. It therefore being clear, that the words "on *shore*," in this statute must mean *on land* (*a*), the JUDGES are of opinion, that this statute is not repealed by the statute 24 Geo. III. c. 48. s. 10 (*b*), and that the prisoner having been properly convicted of the present indictment, is liable to the discretionary punishment of the Court.

(*a*) At the Old Bailey in December Session 1788, *William England* was tried on the statute 24 G. III. c. 47. s. 15. before Mr. JUSTICE WILSON, for obstructing *James Hiscot* and *William Curtis*, two *officers of excise*, in the due execution of their duty in seizing a quantity of brandy at *Aldborough* in *Wiltshire*. The indictment charged, as in the present case, that the said J. H. and W. C. being excise officers, and then and there *on shore*, &c. And SHEPHARD, the prisoner's Counsel, objected that this statute only extended to custom-house officers; but the objection was over-ruled. The prisoners, however, were both acquitted on the evidence.

(*b*) In the argument in the Exchequer Chamber on this point of the case, Mr. Serjeant Runnington cited the case of *Rex* v. *Cater*, *ante*, p. 274, *notis*, and *Rex* v. *Davis*, *ante*, p. 271, *Case* 135. But MR. JUSTICE HEATH said, that in those cases the statutes by which the former were held to be repealed were passed in subsequent sessions; and that where both statutes are passed in the same session, the latter is only explanatory.

1798.

CASE CCCIV.

THE KING *against* ROBERT REEVES.

An indictment for forging a *Scrip Receipt*, signed "*C. Olier*," stating "With the name *C. Olier* thereunto subscribed, *purporting* to have been signed by one *Christopher Olier*, and to be a receipt of the said *Christopher Olier*," is bad; for "*C. Olier*" does not, upon the face of it, *purport* to be *Christopher Olier*; but an indictment stating *the tenor* only, without any *purporting*, is good. See 2 East, 984, *notis*.

AT the Old Bailey in January Session 1798, *Robert Reeves* was tried before MR. JUSTICE LAWRENCE, present MR. JUSTICE HEATH, and MR. BARON THOMPSON, for forgery, on the statute 36 Geo. III. c. 74. s. 22. which makes it a capital offence "to forge or counterfeit any receipt for the whole of,

or any part or parts of the contributions towards raising the sum of 7,500,000*l.* either with or without the name or names of any person or persons being inserted therein, &c."

THE indictment stated that "*Robert Reeves*, late of *London*, gentleman, on the 1st day of February, in the 37th year, &c. to wit, at *London*, that is to say, at the parish of *St. Christopher-le-Stocks*, in the ward of *Broad-street*, &c. was possessed of, and had in his custody and possession, a certain *receipt* for a part, to wit, sixty-seven pounds, of a certain contribution, to wit, a contribution of six hundred and seventy pounds, towards raising seven millions, five hundred thousand pounds, mentioned in a certain Act of Parliament passed in the thirty-sixth year, &c. intitled An Act for raising the sum of Seven Millions, Five Hundred Thousand Pounds, by way of Annuities; THE TENOR of which said receipt is as follows; that is to say:

"LOAN, 1796, for £.7,500,000.

"£.1000 3 per Cent. Annuities 1796, to be added to Consolidated 3 per Cent. Annuities 1138, by virtue of a resolution of the House of Commons, for raising £.7,500,000 for the service of the year 1796.

"RECEIVED of *Ellis Vere*, Esq. the sum of £.67. for a deposit of 10 per cent. upon £.670 subscribed by him in pursuance of the above said resolution; and upon payment of the remaining 90 per cent. of the said sum of £.670, the said subscriber or his assigns, by his or their indorsement thereon, will, in exchange for this receipt, become intitled to £.1000 joint stock of 3 per cent. annuities, which were consolidated at the Bank of England, by certain Acts made in the 25th, 28th, 29th, 32d and 33d of his late Majesty, King George the Second, and by several subsequent Acts: the interest to commence from the 6th January, 1796. Any subscriber who shall be possessed of any Exchequer bill or bills issued pursuant to an Act for raising a certain sum of money by loans for the service of the year 1796; and by another Act passed in the same Session, intitled, 'An Act for raising a further Sum of Money by Loans or Exchequer Bills for the Service of the Year 1795;' or by another Act passed in the same Session, intitled, 'An Act for enabling his Majesty to raise the Sum of 2,500,000, for the uses and purposes therein mentioned;' as by another Act passed the same Session, intitled 'An Act for granting to his Majesty a certain Sum of Money out of the Consolidated Fund, for the Service of the Year 1795, and for further appropriating the Supplies granted in this Session of Parliament,' will be ready to pay or deliver in the same, with the interest due thereon, for the purchase of the said annuities; and

1798.

REEVES'S CASE.

every subscriber who shall complete his subscription on or before the 2d of September next, will be allowed a discount, after the rate of 3 per cent. upon the sum so completing the subscription, from the day of paying it to the 26th October 1796.—WITNESS my hand, this 26th day of April, 1796.

"C. OLIER.

"£.67. 0. 0. ENTERED, *W. Bridges.*"

AND THAT the said *Robert Reeves*, well knowing the premises, but wickedly and unlawfully devising and intending to deceive and defraud the Governor and Company of the Bank of England, afterwards, to wit, &c. with force and arms, at, &c. feloniously did falsely forge, &c. under the said receipt, a certain other receipt, for another part, to wit, &c. one hundred pounds and ten shillings, of the said contribution, with the name *C. Olier* thereunto subscribed, PURPORTING to have been signed by one *Christopher Olier*, and to be a receipt of the said *Christopher Olier*, for the said last-mentioned part of the said contribution, to wit, the said one hundred pounds and ten shillings, THE TENOR of which said false, forged, and counterfeited receipt, is as follows: that is to say, RECEIVED one hundred pounds ten shillings, for the second payment. £100 10. C. OLIER. ENTERED, *J. Stephens.*" with intention to defraud the Governor and Company of the Bank of England, against the form of the statute in such case made and provided, &c."

THE second count was the same as the first, only stating "with intention to defraud *William Ashforth*, &c." The third and fourth counts were for uttering the said forged receipt with intention to defraud, 1st, the Bank of England; 2dly, *William Ashforth*: and there were four other counts for forging and uttering, with the like intention, but only stating the instrument set out to be a *receipt for money*, partly printed and partly written, without describing, as in the four preceding counts, that it was a receipt for a part of a contribution towards raising the seven millions and a half of money.

THE PRISONER was a stock-broker and coal merchant, residing in the neighbourhood of *William Ashforth*, the prosecutor, who had employed him in his stock transactions as a broker. On the 26th of June, 1796, he requested *Ashforth* to advance him a sum of money on the security of Scrip receipts,

1798.

REEVES'S CASE.

which *Ashforth* accordingly did, to the amount of 2000*l.* and received from the prisoner several Scrip receipts, to the amount of 30,000*l.* In the month of October 1796, the prisoner gave *Ashforth* another Scrip receipt, for other monies that were due to him. Subsequent to this deposit, the prisoner had bought 2000*l.* Imperial Annuities for *Ashforth*, and in the January following borrowed of him 2000*l.* more, on the credit of the Scrip receipts. Mr. *Ashforth* soon afterwards becoming dissatisfied with his original securities, applied to the prisoner for repayment of the money advanced; when the prisoner told him, that if he would sell out the Imperial Annuities, he, the prisoner, would give him *heavy Scrip*, that is, Scrip paid up in full. Mr. *Ashforth* and the prisoner went together, accordingly, to the Bank, on the 19th January, 1797; and on Mr. *Ashforth* giving him up the original Scrip receipts, he desired him to go into the Rotunda, and wait there until he, the prisoner, should see his principal. The prisoner returned in about two hours, and brought with him six Scrip receipts, which he delivered to Mr. *Ashforth*, who put a mark on the corners of five of them. To these receipts, thus delivered, a paper was annexed, as follows:— "Mr. *Ashforth* lends the sum of 4406*l.* 3*s.* upon 8400*l.* Scrip, from the 7th October 1797, to the 21st November following. Mr. *Ashforth* is to have put into his name, on the 21st November 1797, two hundred and fifty pounds a year Imperial Annuities at 9, and two hundred pounds a year ditto at 9½: Mr. *Ashforth* to be allowed half a year interest, the 3d November. Commission to be allowed."—No. 1138, 1000l. 3 per Cents, 670*l.*—No. 407, 1800*l.* 3 per Cents, 1206*l.*—No. 836, 1200*l.* 3 per Cents, 804*l.*—No. 1338, 1800*l.* 3 per Cents, 1206*l.*—No. 1148, 1000*l.* 3 per Cents, 670*l.*—No. 898, 2000*l.* 3 per Cents, 670*l.*—No. 1657, 600*l.* 3 per Cents, 402*l.*—These six receipts, he said, he had got from his principal; and they appeared to be paid up to the full: but it did not appear that any of these six receipts were the same which Mr. *Ashforth* had originally received from, and returned to, the prisoner. The prisoner, on being asked by Mr. *Ashworth*, why these receipts were not converted into stock, said that

1798.

REEVES'S CASE.

his principal was a great man at the Stock Exchange, who returned a 100,000*l.* a day, three or four times over, and that the more stock he brought into the market, the more the price of it would be depressed; and that his wishes to keep up the price, was the reason why he did not chuse to fund the property. These seven Scrip receipts were for the Loan in the year 1796, for 7,500,000*l.* the first payment on which had been really made on the 26th April, 1796, and the receipt signed by "*C. Olier*," one of the cashiers of the Bank of England, and entered "*W. Bridges;*" but all the receipts for the subsequent payments, which were signed in the name of "*C. Olier*," and entered by the name of "*S. Stevens*," appeared to have been forged; for it was proved, by *William Mulleen*, and *Charles Jecks*, two other cashiers, and by *Robert Aslet*, an assistant cashier, that the signature, "*C. Olier*" to all the receipts for all the payments except the first, was not the hand-writing of Mr. *Christopher Olier*, the cashier, whose name it purported to be (*a*); and that there was no person of the name of *Stevens* belonging to the Bank as an entering clerk of Scrip receipts; but that it was a fictitious name. It was also proved, that no payment, except the first, had ever been made at the Bank on the Scrip receipt No. 1138, for 670*l.* or on any of the others.

WOOD, KNAPP, and BALMANNO, for the prisoner, submitted three objections to the consideration of the Court.

FIRST OBJECTION. The Scrip receipt produced in evidence, bears the signature "*C. Olier;*" and the indictment charges the prisoner with having forged a receipt, purporting to be the receipt of "*Christopher Olier;*" and therefore the evidence does not prove the fact charged in the indictment; for the letters "*C. Olier*," may signify the name of *Charles Olier*,

(*a*) Mr. *Olier* was himself called to prove that the name "*C. Olier*," to the second receipts, was not his hand-writing; but his evidence of this fact was objected to by the Counsel for the prisoner, on the ground that he, being the person whose name was charged to be forged, was so far interested as to render him incompetent; and, after argument, THE COURT were of opinion that the objection was good; and his testimony was accordingly rejected.

1798.

REEVES'S CASE.

Catharine Olier, or any other Christian name beginning with a C, as well as *Christopher Olier*. This point has been already solemnly decided by THE TWELVE JUDGES, in the case of *Rex* v. *Gilchrist* (1), who was tried in this Court for forging an order for the payment of money, *purporting* to be signed by *T. Exton*, and to be directed to *Lord George Kinnaird*, *William Moreland*, and *Thomas Hammersley*, bankers and partners, by the name of *Ransom*, *Moreland* and *Hammersley*; but the bill produced in evidence was directed "to *Messrs. Ransom*, *Moreland* and *Hammersley*, and it was objected, that the bill did not purport to be directed to *Lord George Kinnaird*, *William Moreland* and *Thomas Hammersley*, as stated in the indictment; and this case being saved for the opinion of THE JUDGES, they were unanimously of opinion, that it was impossible a bill of exchange, directed "to *Ransom*, *Moreland* and *Hammersley*," could *purport* to be directed to *Lord George Kinnaird*, *William Moreland* and *Thomas Hammersley*; and the prisoner was discharged (*a*). This case is precisely parallel with the present case. There is also the case of *Rex* v. *Jones* (2), who was indicted before LORD MANSFIELD for uttering a certain forged paper writing, purporting to be A BANK-NOTE. The note set out was signed "For self and Company of my Bank of England;" and on a case reserved, it was determined that the note did not *purport*, on the face of it, to be a Bank-note, as charged in the indictment, and that no representation made by the prisoner when he uttered it, could alter its purport.

(1) *Ante*, February Session 1795, page 657. Case 280.

(2) *Ante*, page 204. Case 103.

FIELDING, *for the Crown*, was stopped by the Court from answering this objection.

THE COURT thought the present case differed, in some degree, from both the cases cited, inasmuch as the note in *Jones's Case* did not purport to be a Bank-note; and therefore the indictment, charging that it did so purport, was bad;

(*a*) See Edsall's Case, Southampton Spring Assizes 1798, where the indictment charged the instrument forged as purporting to be directed to "Richard Down, Henry Thornton, John Freer, and John Cornwall," when in fact it was directed to "Messrs. Down, Thornton and Co.," and held bad.

1798.

REEVES'S CASE.

and in *Gilchrist's Case*, as the name of *Lord Kinnaird* did not appear on the face of the bill, it could not purport to be directed to him: but that, in the present case, this Scrip receipt being subscribed with the name *C. Olier*, and the indictment charging that it purported to be signed in the name of *Christopher Olier*, a cashier of the Bank of England, it was not, upon the face of it, repugnant to the bill, or inconsistent with itself. But, to remove all doubt, this point was saved for the consideration of THE JUDGES.

On an indictment for *forging* a Scrip receipt, it must appear that the receipt was signed subsequent to the passing of the statute on which the indictment is founded; but, though signed before, yet if it was uttered after the passing of the Act, the prisoner may be convicted on the count for *uttering* it, knowing it to be forged.

(1) See the case of Rex *v.* Lyons, *ante*, page 597. Case 267.

THE SECOND OBJECTION. This indictment is founded upon the statute 36 Geo. III. c. 74, intitled "An Act for raising the Sum of Seven Millions, Five Hundred Thousand Pounds, by Way of Annuities," and which statute is made to commence from the 14th May 1796. It is an Act that is wholly prospective; for it is enacted by the twenty-second section, "that if any person or persons shall forge or counterfeit, or procure to be forged or counterfeited, or shall willingly act or assist in the forging or counterfeiting, any receipt or receipts for the whole of, or any part or parts of, the said contributions towards the said sum of seven millions, five hundred thousand pounds, either with or without the name or names of any person or persons being inserted therein, as the contributor or contributors thereto, or payer or payers thereof, or of any part or parts thereof (1), or shall alter any number, figure or word therein, or utter or publish, as true, any such false, forged, counterfeited or altered receipt or receipts, with intent to defraud the Governor and Company of the Bank of England, or any Body Politic or Corporate, or any person or persons whatsoever, every person or persons so forging or counterfeiting, or causing or procuring to be forged or counterfeited, or willingly acting or assisting in the forging or counterfeiting, or altering, uttering or publishing as aforesaid, shall be adjudged guilty of felony, and suffer death as a felon, without benefit of clergy." It is necessary, before any person can be legally convicted upon this clause of the statute, that it should be clearly and distinctly proved that the receipt which is the subject of inquiry, was actually forged subsequent to the passing of this Act. No evidence

1798.

REEVES'S CASE.

of this material fact has been given in the present case; and therefore the prisoner cannot be convicted of the offence charged in this indictment. Several receipts were deposited by the prisoner with Mr. *Ashforth*, in the month of June 1796, at which time there was only the receipt thereon dated the 26th April 1796, which was before the passing of the Act. The first receipt upon the present instrument is of the same date; and the receipts for the subsequent payments are not dated. It does not appear that the receipt, No. 1138, 1000*l.* 3 per Cents, 670*l.* which is the subject of the present inquiry, was among the scrip receipts so delivered in the month of June; if it had so appeared, it would have been clear that the receipts for the second and subsequent payments must have been written thereon after the passing of the Act; but Mr. *Ashforth* says that he cannot ascertain whether any of the six receipts that appeared to be paid in full, which were given to him by the prisoner in the Rotunda at the Bank, were among the Scrip receipts which he originally received from him in the month of June; and if they were not, there is not a tittle of evidence from which the Jury can presume that the receipts were written after the 14th May, when the Act commenced. The presumption indeed is, that as the first receipt is dated the 26th April, the subsequent receipts were written at the same time; and if they were, the prisoner cannot be found guilty.

THE COURT thought it unnecessary for the Counsel on the part of the Crown to reply. It is for the Jury to say, whether, upon the whole of the evidence, the receipt was forged subsequent to the passing of the Act; but this consideration only relates to the counts which charge the prisoner with the actual forgery of these receipts, and if they should even be of opinion that they were forged before 14th May, yet if the prisoner after that time uttered and published them as true, knowing them to be false, the offence charged in the other counts is completed. The second set of counts appear to have been entirely overlooked. Both questions are for the Jury to determine.

1798.

REEVES'S CASE.

A *Scrip receipt*, stating that the subscriber, on payment of the full sum, will become intitled to so much 3 per Cent. Consols, is a good receipt, for *a new Loan* raised on that fund.

THE THIRD OBJECTION. The receipt which this indictment charges to have been forged, is not a receipt within the terms and description of the statute on which the indictment is founded. To constitute an offence within this Act, the receipt charged to be forged must purport to be a receipt for a subscription or contribution made for the purpose of purchasing the annuities therein described. The statute recites, that the Commons of *Great Britain* being desirous to raise the necessary supplies, have resolved that the sum of seven millions five hundred thousand pounds be raised by annuities in the manner therein after-mentioned; and enacts, that every contributor towards raising the said sum shall, for every one hundred pounds contributed and paid, either in money or exchequer bills, be intitled to the principal sum of one hundred pounds in the three per cent. consols, and to an additional principal sum of twenty pounds in like annuities, and also to a further principal sum of twenty-five pounds in three per cent. reduced annuities, and also, in respect of every such hundred pounds so contributed, to a further annuity of five shillings and sixpence, to continue for a certain term of sixty-three years and nine months, from 5th April 1796: the interest on the consolidated annuities to commence from 5th January 1796, and the interest on the reduced annuities from the 5th April 1796. It then further enacts, "That all money to which any person or persons shall become intitled by virtue of the Act, in respect of any sum advanced or contributed towards the said sum of seven millions five hundred thousand pounds, on which the said respective annuities first mentioned, after the rate of 3 per cent. per annum, shall be attending, shall be added to the joint stock of annuities transferable at the Bank of *England*, into which the several sums carrying an interest after the rate of 3 per cent. per annum, were by the statutes 25 Geo. II. c. 25, the 28 Geo. II. c. 15, the 29 Geo. II. c. 7. the 32 Geo. II. c. 10, & the 33 Geo. II. c. 12, and by several subsequent Acts, consolidated, and shall be deemed part of the said joint stock of annuities, subject nevertheless to redemption by parliament in such manner, and upon such notice, as in the

1798

REEVES'S CASE.

25th Geo. II. c. 25. is directed in respect of the several and respective annuities redeemable by virtue of the said Act; and that all and every person and persons, and corporations whatsoever, in proportion to the money to which he, she, or they shall become intitled as aforesaid, by virtue of this Act of 36 Geo. III. c. 74. shall have, and be deemed to have, a proportional interest and share in the said joint stock of annuities at the rates aforesaid." The statute then proceeds, in like manner, with respect to the twenty-five pounds 3 per cent. reduced annuities, to add the said annuities given by this Act to the joint stock of annuities which were reduced from four to three per cent. by the 23 Geo. II. c. 16; and with respect to the *5s. 6d.* long annuities, to add the said annuities to, and to make one joint stock with the annuities created by the statutes 1 Geo. III. c. 18. and 2 Geo. III. c. 10. These several annuities, therefore, are not only original in themselves, so far as they respect the loan of 7,500,000*l.* to be raised by the present Act, but are perfectly distinct from, and independent of each other. The statute cannot by any possible construction relate to any other subscription or contribution, or be intended to apply to any other funds or stocks, than those by which the loan was to be raised and secured. A receipt, to fall within the description of the offences created by this Act of Parliament, must be for one or other of the annuities therein described; but by adverting to the terms of the present receipt, it will appear to have been given for quite a distinct and different annuity. It is a receipt for a subscription of 670*l.* for the purchase of 1000*l.* in the old stock, which had been consolidated by the former Acts of Parliament. To have brought it within this statute, it ought to have been, at least, for the sum to be created into stock by this new Act and added to the old stock, whereas it is a receipt for 1000*l.* in a stock which has been long consolidated, and which this Act does not authorize the sale of. The difference is certainly great between a receipt given for 1000*l.* 3 per cent. annuities, consolidated so long ago as the 25, 28, 29, 32, & 33 of George the Second, and for 1000*l.* of the like stock, consolidated in the 36 of George the Third.

1798.

REEVES'S CASE.

—There is also another ground upon which this receipt cannot be considered a receipt within the meaning of this Act (1). Every person subscribing to the loan to be raised by this Act of Parliament is intitled to three different species of stock; *viz.* to consols, to reduced, and to long annuities, in proportion to every 100*l.* subscribed. But the present receipt is a receipt for money subscribed for the purchase of *consols* only. The receipt must be according to the terms of this Act, and therefore, ought to have been a receipt for so much money for which the party was intitled to such a quantity of 3 per cent consols, to such a quantity of 3 per cent. reduced, and to such a quantity of long annuities. The Governor and Company of the Bank of *England* may, possibly, for the conveniency of the public, find it necessary to give separate receipts, but such a practice, if it really exist, has not been proved in the present case; nor can the Bank, by any particular mode which it may adopt for the purpose of transacting more conveniently this sort of business, bring any person within the penalties of this Act.

(1) A *Scrip receipt* for so much 3 per cent. consols only is good, although the subscription intitled the subscribers not only to so much *consols*, but also to so much *reduced*, and to so much *long annuities*.

THE COURT. This objection seems to have been conceived upon a partial reading of the receipt, for if the whole of it be attended to, it will be impossible to say, that sufficient does not appear on the face of it to shew that it is for monies subscribed under the present statute. It begins "Loan 1796, for 7,500,000*l.*—1000*l.* 3 per cent. annuities 1796, to be added to consolidated 3 per cent. annuities 1138, by virtue of a resolution of the House of Commons, for raising 7,500,000*l.* for the service of the year 1796." It then, as set out in the indictment, goes on, "Received of *Ellis Vere, Esq.* the sum of 67*l.* for a deposit of 10*l.* per cent. upon 670*l.* subscribed by him in pursuance of the above-said resolution; and upon due payment of the remaining 90*l.* per cent. of the said sum of 670*l.* the said subscriber, or his assigns, by his or their indorsement thereon, will, in exchange for this receipt, become intitled to 1000*l.* joint stock of 3 per cent. annuities, which were consolidated at the Bank of England by certain Acts made in the 25, 28, 29, 32 & 33 of his late Majesty George the Second, and by several *subse-*

quent Acts." Now the statute of 36 Geo. III. c. 74. upon which the present indictment is founded, is surely one of the *subsequent Acts* mentioned in the receipt by which these annuities have been consolidated, and sufficiently shews that the receipt is for monies subscribed or contributed under it. But it is said, that the receipt ought to pursue the very terms of the Act, and that the proportion of each annuity to which the subscriber is intitled ought to be inserted therein, according to the amount of his subscription. The clause of the statute which creates the present offence enacts, "That if any person or persons shall forge or counterfeit, &c. any receipt or receipts for *the whole* of, or *any part or parts* of, the said contribution, &c." And does not this receipt appear to be for a part of this contribution? The Bank, there is no doubt, does its business correctly. The conveniency of giving separate and distinct receipts is very great. It affords every individual an opportunity of purchasing into whichever fund he likes best. The receipt is unquestionably a receipt within the meaning of this Act of Parliament.

THESE objections being over-ruled, the Counsel for the prisoner called witnesses, who proved that he had, during the whole of his life, borne the character of an honest man; that such receipts are purchased at the Stock Exchange, from persons frequently unknown to the purchaser; and that they pass from one to another, with the same currency as Bank-notes.

THE JURY, however, found the prisoner GUILTY; but the Judgment was respited, and the case submitted to the consideration of THE TWELVE JUDGES.

No opinion was ever publicly delivered on *this case*, but in the April Session following, the prisoner was again tried before LORD KENYON on another indictment, on the statute 36 Geo. III. c. 74. for forging another scrip receipt, signed *Wm. Mullens*, with intent to defraud *Thomas Parry*, &c.

THIS indictment charged, "That *Robert Reeves*, on the 1st February, in the 37th year, &c. was possessed of, and had in his custody, a certain receipt for part, to wit, sixty-seven pounds, of a certain contribution, to wit, a contribution

1798.

REEVES'S CASE.

for six hundred and seventy pounds, towards raising seven millions five hundred thousand pounds, mentioned in a certain Act of Parliament, &c.; the tenor of which said receipt is as follows, &c. (setting out an instrument precisely similar to that set out in the former indictment, except in the names of the parties); and that he, well knowing the premises, but wickedly and unlawfully devising and intending to deceive and defraud the Governor and Company of the Bank of England, afterwards, to wit, &c. feloniously did falsely forge, &c. under the said receipt, a certain other receipt for another part, to wit, one hundred and ten pounds ten shillings, of the said contribution; THE TENOR of which said receipt is as follows, that is to say,

RECEIVED one hundred pounds and ten shillings, for second payment, } £100 10

ENTERED, *W. Johnston.* WM. MULLENS.

with intention to defraud, &c." without setting out, as in the former indictment, the PURPORT of this receipt in any one of the counts.

AND upon this indictment the prisoner was convicted and executed.

CASE CCCV.

THE KING *against* BARNARD HUET.

On an indictment for forging a bank-note, a letter, purporting to come from the prisoner's brother, and left by the postman pursuant to its direction, at the prisoner's lodgings, after he was apprehended and during his confinement, but never actually in his custody, cannot be read in evidence against him on his trial.

AT the Old Bailey in February Session 1798, *Barnard Huet* was tried before MR. JUSTICE ASHHURST, present MR. BARON THOMPSON and MR. JUSTICE ROOKE, for forging a Note, of which the following is a copy.

"No. 7135. No. 7135.

"1796. BANK, 16th February, 1796.

"I PROMISE to pay to *Mr. Ab. Newland*, or Bearer, on demand, the sum of Thirty Pounds.

"*London*, 16th day of Feb. 1796.

"For the Governor and Company

"of the Bank of England.

"£30. *Entered. S. Fatt.* "J. PRETTY."

1798.

HUET'S CASE.

THE indictment consisted of twelve counts, which respectively charged it to be, First, a Bank-Note; Secondly, a note in the form of a Bank-Note; Thirdly, a Promissory-Note; and that the prisoner had uttered it, knowing it to be forged, with an intention to defraud, First, *the Bank of England*; Secondly, *Thomas Shaw*; and Thirdly, Messrs. *Cocksedge and Maitland.*

THE PRISONER was a native of *France*, receiving daily support, as an emigrant Frenchman, from the bounty of the English Government. On the 24th October 1797, he received two notes in a letter, which he said came from his brother at *Hamburgh*, one of which was for the sum of thirty pounds. On the 6th November following he deposited the note in question with *Thomas Shaw*, a man who kept a gaming-house in *Jermyn-street*, near *St. James's-square*, and who, at this time, had the management of a *Rouge et Noir* table in *Leicester-fields*, for the sum of five pounds; but *Shaw* having passed it for the whole of its nominal value, it was discovered to be a forgery, and the prisoner was apprehended on the 11th November, at his lodgings at No. 10, in *Wardour-street*, in *Oxford-road*, and his papers, which were pointed out by himself as belonging to him, were seized by the police officers. He was examined on the same day before the Magistrates at THE PUBLIC OFFICE in *Bow-street*, and on its being proved that his examination was not taken down in writing, *viva voce* testimony was admitted on his trial of what he said on that occasion. On the note being produced to him, he admitted that it was the same he had given to *Thomas Shaw*, and said positively, several times, that he had found it, together with a note of twenty pounds, one evening in *Leicester-square*, folded in a piece of paper resembling the cover of a letter, and that he had passed the twenty pound note at a common gaming-house in *Suffolk-street*, near *Charing-cross*. On this confession he was committed for further examination. During his confinement, the officer who had the custody of his papers carried them, by order of the Solicitor of the Bank, to the prisoner, who, on looking them all over, found the cover of a letter, a half sheet of letter-paper, which

(1) Vide Rex v. Fearshire, *ante*, page 202. Case 101. and Rex v. Jacobs, *ante*, page 309. Case 150. and the Case there cited, 311.

1798.

HUET'S CASE.

he said was the paper that had inclosed the notes. On the 9th December, and while the prisoner was thus in confinement, the landlady of the house where he had lodged, gave to the police officers a letter which had that day been left at her house from the post-office, directed, "*A Mons. Huet, No. 10, Wardour-street, Oxford-road;*" and which, on being opened by the Solicitor of the Bank, was found to be dated "*Altona*, 22d November 1797;" to be written *as* from his brother, in the French language; and to contain a note for twenty-five pounds, of the same species of manufacture as that on which the prisoner was indicted; but there was no name subscribed to it. It complained of the deep distress of the writer; of the neglect of his friends; and of his resources being nearly exhausted, concluding, "I am in such misery that there is nothing I would not undertake; but although I am convinced that you have not acted sincerely towards me, I still give way to a sentiment of which I was always the dupe to you: You will find inclosed, a bill of *twenty-five pounds*. Remember—be very prudent and circumspect in your conduct; do not expose yourself in making the most of it, whatever be your situation; but do not forget that I am very unhappy, and continue to send me something. Prove to me that you have a desire to oblige me. I hope you will not be indisposed at the receipt of my letter, and that you will answer me as speedily as possible." On the 27th December the prisoner was again carried to *Bow-street* for further examination; and on being again questioned how he had come by the note stated in the indictment, he said that he had received it in a letter from his brother at *Altona;* and that the cover of the letter was among the papers which had been seized at his lodgings; and on its being produced, he said that was the cover. The letter dated 22d November 1797, was then folded up, and shewed to him, and on being asked if he knew the writing of the direction on the back of it, he replied,—"*I do;*" and to the question, whether it was his brother's writing, he answered, "*Yes;*" but on being again asked the same question, after he had opened the letter, and read part of it, particularly the conclusion, he burst into a flood of

tears, and said, "*I do not!—I do not know whose writing it is; nor is the letter intended for me!*"—The contents of this letter had been translated into English, by *Elias Buzaglo*, a professed translator of languages, who swore it was a faithful translation.

THE COUNSEL *for the Crown* offered to give this translation in evidence at the trial, to prove that the prisoner *knew* the note which he had uttered to *Thomas Shaw*, was a forged note; but, Mr. Fielding, Mr. Knowlys.

THE COUNSEL *for the prisoner* contended, that as this letter had never been in the prisoner's possession; as it had not even been delivered at his lodgings until after he had been nearly a month in custody; and as his admission that the superscription of it was his brother's hand-writing, could not affect him with any knowledge or adoption of the contents, it could not be read in evidence against him; and a case of a similar nature was cited to have occurred on the trial of *Mr. Horne Tooke*, for high treason, where the evidence of papers, found some days subsequent to the apprehension of the prisoner, in the hand-writing of persons connected with the conspiracy charged, was rejected, because it did not appear that the papers existed prior to the prisoner being apprehended; and that it was impossible a letter that did not arrive until a long time after the prisoner had been in custody, which had never been in his possession, and which he had never, by any act of his own, adopted, but which was merely the act of a stranger residing in a foreign country, and not proved to be connected with him in the offence charged, could be made to affect him by any rule of law. Mr. Knapp, Mr. Gurney.

THE COURT, however, concurred in receiving the evidence, and the translation of the letter was read accordingly.

THE Jury found the prisoner guilty; but the case was saved for the opinion of THE TWELVE JUDGES.

THE Judges, it is said, were of opinion that the letter ought not to have been received in evidence; but no declaration of this opinion was ever publicly made, but the prisoner received a free pardon, and was discharged from Newgate.

1798.

CASE CCCVI. THE KING *against* NICHOLAS ABRAHAT.

If a cornfactor purchase the cargo of a vessel laden with corn, and send his servant with a lighter to fetch it from the ship in loose bulk, and the servant contrive to have a certain portion of it put into sacks by the meters on board the ship, and take the corn so sacked feloniously away in the lighter, immediately from the ship, he may be indicted for stealing the property of the cornfactor, although it was never put into his lighter, or otherwise reduced into the cornfactor's possession.

S. C. 2 East, 569.

AT the Lent Assizes for the county of *Surry*, holden at *Kingston*, in 1798, *Nicholas Abrahat* was tried before MR. JUSTICE BULLER, on the statute 24 Geo. II. c. 45. for stealing five quarters of oats from a barge on the navigable river Thames, the property of *John Bovill*, *James Brown*, and *Edward Cole*.

THE prosecutors were cornfactors, carrying on business at their wharf, situate in *Milford-lane*, in the *Strand*. The prisoner was their servant, and had been employed by them, many years, in superintending the unloading of corn vessels. The prosecutors had purchased two hundred and forty quarters of oats, on board a Dutch vessel lying on the Surry side of the Thames, of which the five quarters in question were part. While the corn-meters were in the act of unloading the oats from the Dutch vessel into *the prosecutors' barge*, the prisoner with another person came alongside in a boat, and handed ten empty sacks on board the Dutch vessel. The prisoner desired that the sacks might be filled with oats and tied, saying, they were going to be put into an up-country lug-boat. He also desired that the account of the oats put into the sacks might be carried to the score, and not a separate account made of them. The whole of the two hundred and forty quarters of oats, excepting the five quarters put into the sacks by the prisoner's desire, were loaded in loose bulk into the prosecutor's barge. After the sacks were filled, a person, by the prisoner's direction, took them away from the vessel to *Horsleydown-stairs* where they were delivered to the person who purchased them of the prisoner. The prisoner had never been employed by the prosecutors to sell corn for them; nor was he authorized so to do.

THE Jury found the prisoner guilty; but the learned Judge saved the case for the opinion of the JUDGES.

AT the Summer Assizes for Surry 1798, holden before

LORD KENYON, at *Guildford*, the prisoner received judgment of death, the JUDGES being of opinion that the conviction was right (*a*). 1798.

ABRAHAT'S CASE.

(*a*) "In this case," says Mr. East, "there appears to have been a tort committed by the servant in the very act of taking; and the property of his masters in this case was complete before the delivery to him; and after the purchase of it in the vessel they had a lawful and exclusive *possession* of it as against all the world but the owner of such vessel.

THE KING *against* JOHN SPEARS.

CASE CCCVII.

If a cornfactor purchase a ship laden with corn, and send his lighter to fetch it from the ship to his wharf, a delivery of the corn on board the lighter, puts it into *the possession* of the cornfactor, although the lighterman never delivers it at the factor's wharf. S. C. 2 East, 568.

AT the Lent Assizes holden at *Kingston*, for the county of *Surry*, in the year 1798, *John Spears* was tried before MR. JUSTICE BULLER, on the statute 24 Geo. II. c. 45. for stealing five quarters of oats, the property of *James Brown*, *John Bovill*, and *Edward Cole*, from a barge on the navigable river Thames.

THE prosecutors were cornfactors, carrying on business at their wharf, situate in *Milford-lane*, in the *Strand*. The prisoner was employed in the service of the prosecutors as a lighterman; and on the 6th February 1798, was ordered to go with their barge to one *Wilson* a corn-meter for as much oats, in loose bulk as the barge would carry. The prisoner accordingly proceeded with the barge alongside a ship lying on the river Thames, at *East-lane*, in the county of *Surry*, and received from *Wilson* two hundred and twenty quarters of oats in loose bulk, and five quarters in sacks; the cargo having *been purchased* by the prosecutors. On the prisoner's arrival with the barge at the ship, he desired the corn-meter to put five quarters of the oats into ten sacks, which appeared to be flour or meal sacks, and not regular corn sacks. The sacks, when so filled, were placed on *the cabin of the barge*; the two hundred and twenty quarters being loaded into the barge in loose bulk. The corn-meter soon afterwards going up the river, saw the barge lying at *Mill Stairs*, two or three hundred yards from the place where the loading was taken in, and observed that the ten sacks, containing five quarters of

1798.

SPEARS'S CASE.

oats, were not in or upon the barge. On the oats being measured on the arrival of the barge at the prosecutors' wharf, only two hundred and twenty quarters were contained in the barge, and were all in loose bulk, not any oats in sacks being on board the barge.

THE prisoner was found guilty; but the learned Judge saved the case for the opinion of the JUDGES; on a question, whether as the oats had never been in the possession of Messrs. *Brown*, *Bovill* and *Cole*, this case amounted to felony (*a*), or whether it was not like the case of a servant receiving charge of or buying a thing for his master and never delivering of it.

AT the Summer Assizes for Surry, holden at *Guildford*, before LORD KENYON, the prisoner received judgment of death; the JUDGES being of opinion that the conviction was right.

(*a*) The corn was in the prosecutors' barges; and it was a taking from the actual possession of the owner as much as if the oats had been in his granary. Per HEATH J. in the case of Rex *v.* Walsh, 52 Geo. III. 4 Taunton Rep. 276.

CASE CCCVIII.

THE KING *against* ELIJAH FORSYTH.

On the trial of an indictment for bigamy, in the county where the party was *apprehended*, and not where the second marriage was had, the *apprehension* in the county, if *a warrant* has issued, must be proved by the production of *the warrant* in order to give the court jurisdiction.

AT the Old Bailey in July Session 1798, *Elijah Forsyth* was tried before MR. JUSTICE BULLER, present MR. JUSTICE LAWRENCE, on an indictment charging that he on the 1st January 1775, at the parish of *Brechead* in the county of *Antrim*, in the kingdom of *Ireland*, did marry *Bridget Baldridge*, and afterwards on the 5th February 1784, at *Manchester*, feloniously did marry *Margaret Wilson*, the said *Margaret Baldridge* being still alive.

THE first and second marriages were proved as stated in the indictment. It was also proved by *James Wilson*, that a warrant had been granted by a Justice of Peace at *Manchester*, to apprehend *Forsyth* on a charge of *Bigamy*; that *Forsyth* at the time of signing the warrant resided at *Manchester*, where the second marriage had been celebrated; that

1798.

FORSYTH'S CASE.

he had removed from thence to *London*; and that he had surrendered to one of the Police Magistrates in *London*, who, after an examination on the evidence of *James Wilson*, the second wife's brother, had admitted him to bail, and bound *Wilson* over to prosecute.

THE statute 1 Jac. I. c. 11. on which the indictment was founded, enacts, "That the party and parties so offending shall receive such and the like proceeding, trial, and execution in such county where such person or persons shall be *apprehended*, as if the offence had been committed in such county where such person or persons shall be taken or apprehended.

THE COURT, therefore, on an objection taken by the prisoner's Counsel, were of opinion that as the *warrant* had not been produced, and as it had not been proved that the prisoner was *apprehended* in the county of *Middlesex*, the Court had not jurisdiction to try him, and on this objection

Mr. Garrow, Mr. Const, Mr. Leach

THE prisoner was discharged.

THE KING *against* JOHN COLLINS.

CASE CCCIX.

AT the Old Bailey in September Session 1798, *John Collins* was tried before SIR A. MACDONALD, *Chief Baron*; present MR. JUSTICE ASHHURST, and MR. JUSTICE ROOKE, for forging *hat stamps*, contrary to the statute 36 Geo. III. c. 125.

If a statute, as 24 Geo. III. c. 51. impose a duty on hats, and direct a stamp on paper tickets, denoting such duty to be affixed to each hat sold; and a subsequent statute, as 36 Geo. III. c. 125. enact, that *so much* of the former statute as relates to stamped paper tickets, shall cease, and that a stamp, denoting the duties imposed by the former Act, shall be affixed on the lining of each hat, an indictment expressly on the latter statute, concluding in the *singular number*, is good.

THE indictment stated, "That *John Collins*, late of the parish of *St. Luke*, in the county of *Middlesex*, labourer, on the 11th July, in the 38th year, &c. with force and arms, &c. feloniously did counterfeit and forge, and procure to be counterfeited and forged, a stamp and mark to resemble a stamp and mark then and there directed *to be used* in pursuance of a certain Act of Parliament made at Westminster

1798.

COLLINS'S CASE.

in the county of *Middlesex*, in the 36th year of the reign, &c. intituled, "*An Act for the better Collection of the Duty on Hats*," for the purpose of denoting the stamp duty of two shillings, charged by virtue of *the statute in such case made and provided*, for every felt or wool, stuff or beaver hat, or any leather or japanned hat exceeding the price or value of twelve shillings, which should be uttered, vended, or sold by any person or persons taking out, in pursuance of the statute in such case made and provided, a license for uttering or vending in Great-Britain, by retail, any hat, commonly called or known by the name of felt or wool, stuff or beaver hats, or any leather or japanned hats, with intent to defraud our said Lord the King; in contempt of our said Lord the King and his laws; against the peace, &c. and against the form of *the statute* in such case made and provided." There was a second count charging "the forging and counterfeiting a stamp or mark to resemble a stamp or mark then and there *used* in pursuance of a certain Act of Parliament, intitled, "*An Act for the better Collection of the Duty on Hats*, &c." a third count for feloniously counterfeiting and *resembling the impression* of a certain mark then and there directed *to be used*, &c." and a fourth count "for feloniously counterfeiting and resembling the impression of a certain mark then and there *used*, &c."

THE prisoner, together with one *Barnet Solomons*, a Jew pedler, and several others, were apprehended on the day laid in the indictment, by the Police Officers, at a house in *Chequer-alley*, near *Bunhill-row*, working at the rolling-press, by which the stamp in question was forged, with the linen ready damped, the plate upon the jigger, the grate to lay the jigger on, with charcoal underneath it, and every other material and apparatus complete for printing; and the impressions that had been taken off were hanging over lines to dry. The stamp was proved to be a counterfeit stamp, and *Barnet Solomons*, who was admitted a witness for the Crown, proved that it had been made and used by the prisoner.

1798.

COLLINS'S CASE.

Solomons admitted that he had been tried at the Old Bailey above two years before, by the name of *Barnet Bennet*, for coining halfpence, and therefore,

The record of the conviction and judgment must be produced before a convict for coining can be a witness.

SERJEANT SHEPHERD, the prisoner's Counsel, objected, that he was not a competent witness, until the record of his conviction had been produced; and until it had been proved that he had suffered the sentence of the law, and this proof was accordingly given by the Counsel for the Crown (*a*).

BY the statute 24 Geo. III. c. 51. s. 1. it is enacted, "That all persons uttering or vending in Great Britain, by retail, any hats, commonly called or known by the name of *felt* or *wool*, *stuff* or *beaver* hats, or any leather or japanned hats, shall annually take out A LICENSE for that purpose; that for every such hat exceeding the price or value of *twelve shillings*, which shall be uttered, vended, or sold by any person or persons taking out such license, there shall be charged A STAMP DUTY of *two shillings*; that in order to secure the said duty, every such person shall apply to the Commissioners of Stamps for *paper tickets*, stamped with the several and respective duties thereby imposed, to be pasted or affixed by the person or persons so uttering or vending such hats, to the lining in the inside of the crown of such hat or hats, in such manner and form as the said Commissioners shall direct; and that if any person shall counterfeit or forge, or procure to be counterfeited or forged, any stamp or mark directed or allowed to be used by this Act for the purpose of denoting the duties by this Act granted, or shall counterfeit or resemble the impression of the same, with an intent to defraud his Majesty, his heirs and successors, of any of the said duties; or shall privately or fraudulently use any seal, stamp, or mark, directed or allowed to be used by this Act, with intent to defraud his Majesty, his heirs and successors, of any of the said duties, every person so offending shall suffer death as a felon, without benefit of clergy."

BY 36 Geo. III. c. 125. s. 1. it is enacted, "That so much

(*a*) See Rex *v.* Smith, *ante* December Session 1783; Rex *v.* Castel Carcenion, 8 East's Term Rep. 77 and 2 Hawk. P. C. c. 46. s. 20.

1798.

COLLINS'S CASE.

of the 24 Geo. III. c. 51. as relates to the issuing of *stamped paper tickets* by the Commissioners of the Stamp Duties, or to the affixing such stamped tickets in or upon the hats liable to the said duties by the respective dealers in such hats; and all penalties and provisions therein contained for enforcing the due collection of the said duties, shall cease and determine, and that from thenceforth the said duties shall be raised, levied, collected and paid under the provision and subject to the penalties thereinafter contained and expressed."—The statute then proceeds to authorize the Commissioners to provide proper stamps, and enacts, "That the rates of duty by the 24 Geo. III. c. 51. imposed, shall be calculated at, and according to, the full price and value of the hats in respect of which such duty shall be charged, and of all the mountings and other ornaments (except gold and silver lace) sold or exposed to sale therewith, and that all hats which shall be sold and delivered, shall, previous to such delivery, be lined or covered in the inside of the crown thereof with silk, linen, or other proper materials whereon a durable mark or stamp can conveniently be affixed, to denote the duties by the said recited Act 24 Geo. III. c. 51. imposed, and on which materials a stamp or mark to be provided by the said Commissioners in pursuance of this Act, shall have been stamped or marked according to the rate of duty calculated as aforesaid, and according to the direction of this Act." The statute then further enacts, "That if any person or persons shall counterfeit or forge, or procure to be counterfeited or forged, any stamp or mark directed to be allowed, or used, or provided, made or used, in pursuance of this Act, or shall counterfeit or resemble the impression of the same, with intent to defraud his Majesty, his heirs or successors, or shall utter, vend, or sell, or expose to sale, or cause or procure to be uttered, vended, or sold, or exposed to sale, any piece of silk, linen, or other material or thing, with such counterfeit mark or stamp thereon, knowing such mark or stamp to be counterfeited, or if any person shall privately or fraudulently use any stamp or mark directed or allowed to be used by this Act, with intent and design to defraud his Majesty, his heirs

and successors, of any of the said duties, then every such person so offending shall be adjudged a felon, and shall suffer death, as in cases of felony, without benefit of clergy." 1798.

COLLINS'S CASE.

SERJEANT SHEPHERD and KNAPP took two objections, on these statutes, in favour of the prisoner.

THE FIRST OBJECTION was, that the indictment was insufficient, inasmuch as it charged the prisoner with having forged a stamp to denote a duty charged by virtue of the statute 36 Geo. III. c. 125. whereas this statute does not charge any duty at all, and therefore it ought to have alleged that he had forged a stamp to denote a duty charged by virtue of the 24 Geo. III. c. 51.

See Rex v. Morgan, 2 Stra. 1066.

THE SECOND OBJECTION was, that the indictment ought to have concluded in the plural number, "against the form of the statutes."

BUT the prisoner was convicted; and the Court on these objections saved the case for the opinion of THE TWELVE JUDGES.

MR. BARON PERRYN, in December Session 1798, ordered the prisoner to be put to the bar, and delivered the opinion of the JUDGES as follows:—The question in this case arises upon the two statutes 24 Geo. III. c. 51. and 36 Geo. III. c. 125. The first statute, among many other duties, imposes a duty of two shillings upon all hats of a certain value, ordering, by the eighth section, a stamp, such as the Commissioners shall direct, to be put upon the lining in the crown of each hat; and by the twenty-fifth section making the counterfeiting of such stamp a capital offence. But the Legislature afterwards, by 36 Geo. III. c. 125. thought proper to impose the same duty by these words, "and that from thenceforth *the said duties* shall be raised, levied, collected, and paid under the provisions, and subject to the penalties thereinafter contained and expressed;" and to direct a different kind of stamp to be used, and thereby repealed so much of the 24 Geo. III. c. 51. as related to the mode of placing the stamp in the hats that were liable to the duty; that is, instead of fixing a stamped ticket in the crown of the hat as directed

1798.

COLLINS'S CASE.

by the 24 Geo. III. c. 51. the 36 Geo. III. c. 125. directs that the lining itself shall be stamped; and by the nineteenth section, makes the counterfeiting such new stamp a capital offence. It was contended in favour of the prisoner, that as the duty is imposed by one statute, and the stamp denoting its payment is directed by another, the indictment ought to have concluded in the plural number, "against the form of the *statutes* in such case made and provided;" and not as in the present case, against the form of the *statute*, in the singular number only. But it is very clear that the whole of the statute 24 Geo. III. c. 51. so far as it relates to *the offence* charged, is repealed; for there is no part of the 24 Geo. III. c. 51. adopted in the 36 Geo. III. c. 125. except only so far as it says, "that the rates of duty by the 24 Geo. III. c. 50. imposed, shall be calculated according to the full value of the hats, and that all hats, in respect to such duty, shall, before they are sold, have a stamp put upon the lining *to denote the duties by the said recited Act* 24 Geo. III. c. 50. *imposed:*" so that it seems the whole of the provisions of that statute, so far as it relates to the counterfeiting such stamps, are entirely done away: and the Judges, who all assembled on this question, on the first day of the last Term, are clearly of opinion, upon the authority of the case of *Horthbury* v. *Levingham* (*a*), that the conclusion of the present indictment is perfectly right, and that the prisoner at the bar has been properly convicted.

(*a*) This was an action of trespass *quare vi et armis cepit chasiavit et imparcavit averia carucæ*, &c. *contra formam statuti*. The defendant took an exception that the declaration was too general, for that the plaintiff ought to have declared upon *the statute* in particular, inasmuch as there are *two statutes* against the taking of beasts of the plough; but THE COURT said, that *contra formam statuti* is good, although there are several statutes. 1 Sid. 344.—And in the report of this Case, the case of Toptclif *qui tam* v. Waller, is referred to, which was an information of *usury* concluding "*against the form of the statute* in such case made and provided;" and it was moved in arrest of judgment, because no certain statute. But the exception was not allowed: for "*against the form of the statute*," although upon divers statutes of usury, is well enough in an information. Vaillant's Edit. Dyer, 347. See also Rex *v.* West, Owen's Rep. 135. and Hawk. P. C. ch. 25. sec. 117.

1799.

THE KING *against* ELIZABETH TANDY.

CASE CCCX.

AT the Old Bailey, in January Session 1799, the prisoner was tried before MR. JUSTICE HEATH, on the 15th Geo. II. c. 28. s. 3. for knowingly uttering bad money twice within ten days.

The charge in an indictment on 15 Geo. II. c. 28. s. 3. for uttering false money *twice*, or oftener, within *ten days*, must, to warrant the *year's imprisonment* inflicted by the third section of the Act, be contained in *one count*.

S. C. 1 East, 182, 183.

THE first count of the indictment charged, "That *Elizabeth*, the wife of *Nathaniel Tandy*, labourer, on the 15th December, &c. with force and arms, at *London*, aforesaid (that is to say), at the parish of *St. Giles without Cripplegate*, in the ward of *Cripplegate without*, in the city of *London*, one piece of false and counterfeit money, made and counterfeited to the likeness and similitude of a piece of good, lawful, and current money and silver coin of this realm, called AN HALF CROWN, as and for a piece of good, lawful, and current money and silver coin of this realm called AN HALF CROWN, then and there unlawfully, unjustly, and deceitfully did utter to one *George Swinburne*, she the said *Elizabeth Tandy*, at the time when she so uttered the said piece of false and counterfeit money, then and there well knowing the same to be false and counterfeit, in contempt, &c. to the evil example, &c. and against the statute in such case made and provided."

THE second count charged, "That the said *Elizabeth Tandy*, on the same day, &c. one other piece of false and counterfeit money, made and counterfeited to the likeness and similitude of a piece of good, lawful, and current money and silver coin of this realm, called AN HALF CROWN, as and for a piece of good, lawful, and current money and silver coin of this realm, called AN HALF CROWN, then and there unlawfully, unjustly, and deceitfully did utter to the said *George Swinburne*, she the said *Elizabeth Tandy*, at the time when she so uttered the said last-mentioned piece of false and counterfeit money, then and there well knowing the same to be false and counterfeit; in contempt, &c. to the evil example, &c. and against the form of the statute in such case made and provided."

THE statute 15 Geo. II. c. 28. s. 2. after reciting that the

1799.

TANDY'S CASE.

uttering of false money, knowing it to be false, is a crime frequently committed all over the kingdom, and that the offenders therein are not deterred, by reason that it is only *a misdemeanor*, and the punishment very often but small, though there be great reason to believe that the common utterers of such false money are either themselves the coiners, or in confederacy with the coiners thereof, ENACTS, That if any person whatsoever shall utter or tender in payment any false or counterfeit money (*a*), knowing the same to be false or counterfeit, to any person or persons, such person shall suffer *six months' imprisonment*, and find sureties for good behaviour for six months more, &c. and if the same person shall be convicted a second time of the like offence, &c. such person shall suffer *two years' imprisonment*, &c.; and if the same person shall afterwards offend a third time in uttering or tendering in payment any false or counterfeit money, he shall be guilty of felony, without benefit of clergy."—The third section of the statute then enacts, "That if any person whatsoever shall utter or tender in payment any false or counterfeit money, knowing the same to be false or counterfeit, to any person or persons, and shall either *the same day*, or within the space of *ten days* then next, utter or tender in payment any more, or other false and counterfeit money, knowing the same to be false or counterfeit, to the same person or persons, or to any other person or persons, &c. such person shall be deemed and taken to be A COMMON UTTERER of false money, and shall suffer *a year's imprisonment*, and find sureties of good behaviour for two years more, &c."

THIS case was fully proved; but a doubt arose whether

(*a*) These words "false or counterfeit *money*," though general do not include the copper coin. At the Summer Assize for Oxford 1794, Francis Cirwan was indicted for "unlawfully uttering and tendering in payment to J. H. *ten counterfeit half-pence*, knowing them to be counterfeit," and this was laid in one of the counts to be against the form of the statute, and in another count, generally. The defendant was convicted on the general count; it being admitted at the trial that there was no statute applicable to the fact; but upon reference to all the Judges, they held, in Hilary Term 1795, the conviction wrong; it not being an indictable offence. 1 East's Crown Law, 182.

1799.

TANDY'S CASE.

the two facts of the prisoner having uttered two different counterfeit half-crown pieces to *George Swinburne* on the same day, were properly charged in two separate and distinct counts, for the purpose of warranting a conviction on the third section of the foregoing statute, or whether they ought not for, that purpose, to have been laid in one count only?

THE prisoner was found Guilty, but on the above doubt no judgment was passed, and the point was reserved for the consideration of THE TWELVE JUDGES.

AND THE JUDGES were unanimously of opinion that as the fact of uttering twice on the same day was no where *averred* in the indictment, a judgment of *six months' imprisonment*, &c. only, could be passed upon the prisoner under *the second section* of the statute; for that to warrant the greater punishment inflicted by *the third section*, the two facts of uttering twice on the same day should be united in one count, as a single charge.

Absent, Eyre, C. J. Buller J. Heath J.

AND sentence was passed accordingly; the term of the imprisonment to be computed from the time when sentence ought to have been passed.

THE KING *against* JOSEPH BAZELEY.

CASE CCCXI.

AT the Old Bailey in February Session 1799, *Joseph Bazeley* was tried before JOHN SILVESTER, Esq. *Common Serjeant* of the city of *London*, for feloniously stealing on the 18th January preceding, a Bank-note of the value of one hundred pounds, the property of *Peter Esdaile, Sir Benjamin Hammett, William Esdaile*, and *John Hammett*.

Previous to the passing of the statute 39 Geo. III. c. 85. if a banker's clerk, or cashier, who was entrusted to receive Bank-notes and money at the shop-counter, instead of putting them into the cash or bill-drawer,

THE following facts appeared in evidence. The prisoner, *Joseph Bazeley*, was the principal teller at the house of Messrs. *Esdaile's* and *Hammett's*, bankers, in *Lombard-street*, at the salary of 100*l.* a year, and his duty was to receive and

secreted them and converted them to his own use, it was a mere *breach of trust*, and not *felony*; for the property never was in the banker's possession, but such a taking is now made *felony*.—S. C. 2 East 572. See also 1 Hale 505. and Rex *v.* Walsh, 4 Taunton's Rep. 266.

1799.

BAZELEY'S CASE.

pay money, notes, and bills, at the counter. The manner of conducting the business of this banking-house is as follows: There are four tellers, each of whom has a separate money-book, a separate money-drawer, and a separate bag. The prisoner being the chief teller, the total of the receipts and payments of all the other money-books were every evening copied into his, and the total balance or rest, as it is technically called, struck in his book, and the balances of the other money-books paid, by the other tellers, over to him. When any monies, whether in cash or notes, are brought by customers to the counter to be paid in, the teller who receives it counts it over, then enters the Bank-notes or drafts, and afterwards the cash, under the customer's name, in his book; and then, after casting up the total, it is entered in the customer's book. The money is then put into the teller's bag, and the Bank-notes or other papers, if any, put into a box which stands on a desk behind the counter, directly before another clerk, who is called the cash book-keeper, who makes an entry of it in the received cash-book in the name of the person who has paid it in, and which he finds written by the receiving teller on the back of the bill or note so placed in the drawer. The prisoner was treasurer to an association called "The Ding Dong Mining Company;" and in the course of the year had many bills drawn on him by the Company, and many bills drawn on other persons remitted to him by the Company. In the month of January 1799, the prisoner had accepted bills on account of the Company, to the amount of 112*l.* 4*s.* 1*d.* and had in his possession a bill of 166*l.* 7*s.* 3*d.* belonging to the Company, but which was not due until the 9th February. One of the bills, amounting to 100*l.* which the prisoner had accepted, became due on 18th January. Mr. *William Gilbert*, a grocer, in the Surry-road, Black-friars, kept his cash at the banking-house of the prosecutors, and on the 18th January 1799, he sent his servant, *George Cock*, to pay in 137*l.* This sum consisted of 122*l.* in Bank-notes, and the rest in cash. One of these Bank-notes was the note which the prisoner was indicted for stealing. The prisoner received this money from

1799.

BAZELEY'S CASE.

George Cock, and after entering the 137*l.* in Mr. *Gilbert*'s Bank-book, entered the 15*l.* cash in his own money-book, and put over the 22*l.* in Bank-notes into the drawer behind him, keeping back the 100*l.* Bank-note, which he put into his pocket, and afterwards paid to a banker's clerk the same day at a clearing-house in *Lombard-street*, in discharge of the 100*l.* bill which he had accepted on account of the Ding Dong Mining Company. To make the sum in Mr. *Gilbert*'s Bank-book, and the sum in the book of the banking-house agree, it appeared that *a unit* had been added to the entry of 37*l.* to the credit of Mr. *Gilbert*, in the book of the banking-house, but it did not appear by any direct proof that this alteration had been made by the prisoner; it appeared however that he had made a confession, but the confession having been obtained under a promise of favour, it was not given in evidence.

CONST and JACKSON, *the prisoner's Counsel*, submitted to the Court, that to constitute a larceny, it was necessary in point of law that the property should be taken from *the possession* of the prosecutor, but that it was clear from the evidence in this case, that the Bank-note charged to have been stolen, never was either in the actual or the constructive possession of *Esdaile and Hammett*, and that even if it had been in their possession, yet that from the manner in which it had been *secreted* by the prisoner, it amounted only to a breach of trust.

THE COURT left the facts of the case to the consideration of the Jury, and on their finding the prisoner GUILTY, the case was reserved for the opinion of THE TWELVE JUDGES on a question, whether under the circumstances above stated, *the taking* of the Bank-note was in law a *felonious taking*, or only a *fraudulent breach of trust*.

THE case was accordingly argued before nine of the Judges (1) in THE EXCHEQUER CHAMBER, on Saturday, 27th April 1799, by CONST *for the prisoner*, and by FIELDING *for the Crown*.

(1) Lord Kenyon, L. C. J. C. J. Eyre, C. B. Macdonald. Mr. Baron Hotham. Mr. B. Perryn. Mr. Baron Thompson. Mr. J. Grose. Mr. J. Lawrence. Mr. J. Rooke.

1799.

BAZELEY'S CASE.

CONST, *for the prisoner*, after remarking that the prosecutor never had *actual possession* of the Bank-note, and defining the several offences of *larceny*, *fraud*, and *breach of trust*, *viz.* that LARCENY is the taking of valuable property from *the possession* of another *without his consent and against his will*. Secondly, That FRAUD consists in obtaining valuable property from the possession of another *with his consent and will*, by means of some artful device, against the subtilty of which common prudence and caution are not sufficient safeguards. And, Thirdly, That BREACH of TRUST is the abuse or misusing of that property which the owner has, *without any fraudulent seducement*, and with his own *free will and consent*, put, or permitted to be put, either for particular or general purposes, into *the possession* of the trustee, proceeded to argue the case upon the following points.

FIRST, That the prosecutors cannot, in contemplation of law, be said to have had *a constructive possession* of this Bank-note, at the time the prisoner is charged with having tortiously converted it to his own use.

SECONDLY, That supposing the prosecutors to have had the possession of this note, the prisoner, under the circumstances of this case, cannot be said to have tortiously taken it from that possession with a felonious intention to steal it.

THIRDLY, That the relative situation of the prosecutors and the prisoner makes this transaction merely *a breach of trust*; and,

FOURTHLY, That this is not one of those *breaches of trust* which the Legislature has declared to be felony.

THE FIRST POINT, *viz.* That *the prosecutor* cannot, in contemplation of law, be said to have had a constructive possession of this Bank-note at the time *the prisoner* is charged with having tortiously converted it to his own use.—To constitute the crime of larceny, the property must be taken from *the possession* of the owner; this possession must be either actual or constructive; it is clear that the prosecutors had not, upon the present occasion, the *actual possession* of the Bank-note, and therefore the inquiry must be, whether they had

1799.

BAZELEY'S CASE.

the *constructive possession* of it? or, in other words, whether the possession of the servant was, under the circumstances of this case, the possession of the master. Property in possession is said by *Sir William Blackstone* (1) to subsist only where a man hath both *the right to*, and also *the occupation of*, the property. The prosecutors in the present case had only a right or title to possess the note, and not the absolute or even qualified possession of it. It was never in their custody or under their controul. There is no difference whatever as to the question of *possession* between real and personal property; and if after the death of an ancestor, and before the entry of his heir upon the descending estate, or if after the death of a particular tenant, and before the entry of the remainder-man, or reversioner, a stranger should take possession of the vacant land, the heir in the one case, and the remainder-man, or reversioner in the other, would be, like the prosecutor in the present case, only *entitled* to, but not *possessed of*, the estate; and each of them must recover *possession* of it by the respective remedies which the law has in such cases made and provided. Suppose the prisoner had not parted with the note, but had merely kept it in his own custody, and refused, on any pretence whatever, to deliver it over to his employers, they could only have recovered it by means of an action of trover or detinue, the first of which presupposes the person against whom it is brought, to have obtained possession of the property by lawful means, as by delivery, or finding; and the second, that the right of property only, and not the possession of it, either really or constructively, is in the person bringing it. The prisoner received this note by the permission and consent of the prosecutors, while it was passing from the possession of Mr. *Gilbert* to the possession of Messrs. *Esdaile's and Hammett's*; and not having reached its destined goal, but having been thus intercepted in its transitory state, it is clear that it never came to the *possession* of the prosecutors. It was delivered into the possession of the prisoner, upon an implied confidence on the part of the prosecutors, that he would deliver it over into their possession, but which, from the pressure of

(1) 2 Bl.Com. 389, 396.

1799.

BAZELEY'S CASE.

temporary circumstances, he neglected to do: at the time therefore of the supposed conversion of this note, it was in the legal possession of the prisoner. To divest the prisoner of this possession, it certainly was not necessary that he should have delivered this note into the hands of the prosecutors, or of any other of their servants personally; for if he had deposited it in the drawer kept for the reception of this species of property, it would have been a delivery of it into the possession of his masters; but he made no such deposit: and instead of determining in any way his own possession of it, he conveyed it immediately from the hand of Mr. *Gilbert*'s clerk into his own pocket. Authorities are not wanting to support this position. In the *Year-book*, 7 *Hen.* 6. *fol.* 43. it is said, "if a man deliver goods to another to keep, or lend goods to another, the deliverer or lender may commit felony of them himself, for *he* hath but *jus proprietatis*; the *jus possessionis* being with the bailee," and permitting one man to receive goods to the use of another, who never had any *possession* of them, is a stronger case. So long ago as the year 1687, the following case was solemnly determined in the Court of King's Bench on a special verdict. The prisoner had been a servant, or journeyman, to one *John Fuller*, and was employed to sell goods and receive money for his master's use; in the course of his trade he sold a large parcel of goods; received one hundred and sixty guineas for them from the purchaser; deposited ten of them in a private place in the chamber where he slept; and, on his being discharged from his service, took away with him the remaining one hundred and fifty guineas, but he had not put any of the money into his master's till, or in any way given it into his possession. Before this embezzlement was discovered, he suddenly decamped from his master's service, leaving his trunk, containing some of his clothes and the ten guineas so secreted behind him; but he afterwards, in the night-time, broke open his master's house, and took away with him the ten guineas which he had hid privately in his bed-chamber; and this was held to be no burglary, because the taking of the money was no felony: for although it was the master's money *in right*, it

1799.

BAZELEY'S CASE.

was the servant's money *in possession*, and the first original act no felony. This case was cited by *Sir B. Shower*, in his argument in the case of *Rex* v. *Meers* (1), and is said to be reported by *Gouldsborough*, 186: but I have been favoured with a manuscript report of it, extracted from a collection of cases in the possession of the late Mr. *Reynolds*, Clerk of the Arraigns, at the Old Bailey, under the title of *Rex* v. *Dingley*, by which it appears that the special verdict was found at the Easter Session 1687, and argued in the King's Bench in Hilary Term, 3 Jac. IId., and in which it is said to have been determined that this offence was not burglary, but trespass only. The law of this case has been recently confirmed by the case of *the King* v. *Bull*. The prisoner, *Thomas Bull*, was tried at the Old Bailey January Session 1797, before Mr. Justice Heath, on an indictment charging him with having stolen, on the 7th of the same month, a half-crown and three shillings, the property of *William Tilt*, who was a confectioner, in *Cheapside*, with whom the prisoner lived as a journeyman; and *Mr. Tilt* having had, for some time before, strong suspicion that the prisoner had robbed him, adopted the following method for the purpose of detecting him:—On the 7th January, the day laid in the indictment, he left only four sixpences in the till; and taking two half-crowns, thirteen shillings, and two sixpences, went to the house of Mr. *Garner*, a watchmaker, who marked the two half-crowns, several of the shillings, and the sixpences, with a tool used in his line of business, that impressed a figure something like a half-moon. Mr. *Tilt*, having got the money thus marked, went with it to the house of a Mrs. *Hill*; and giving a half-crown and three of the shillings to *Ann Wilson*, one of her servants, and five of the shillings and the other sixpence to *Mary Bushman*, another of her servants, desired them to proceed to his house, and purchase some of his goods of the prisoner, whom he had left in care of the shop. The two women went accordingly to Mr. *Tilt*'s shop, where *Ann Wilson* purchased confectionary of the prisoner to the amount of five shillings and three-pence, gave him the half-crown

(1) 1 Shower, 59.

1799.

HAZELEY'S CASE.

and three shillings, and received three-pence in change; and *Mary Bushman* purchased of him articles to the amount of four shillings and sixpence, for which she paid him out of the monies she had so received, and returned the other shilling to her mistress, *Mary Hill*: but neither of these women observed whether the prisoner put either the whole or any part of the money into the till or into his pocket. While the women, however, were purchasing these things, Mr. *Tilt* and Mr. *Garner* were waiting, with a constable, at a convenient distance, on the outside of the shop-door; and when they observed the women come out, they went immediately into the shop, where, on examining the prisoner's pockets, they found among the silver coin, amounting to fifty-three shillings, which he had in his waistcoat pocket, the marked half-crowns, and three of the marked shillings, which had been given to *Wilson* and *Bushman*; only seven shillings and sixpence were found in the till; and it appeared that Mrs. *Tilt* had taken one shilling in the shop, and put it into the till, during her husband's absence; so that the two shillings which had been left therein in the morning, the one shilling which Mrs. *Tilt* had put into it, the four shillings and sixpence laid out by *Mary Bushman*, and the five shillings and sixpence marked money which was found in the prisoner's pocket, made up the sum which ought to have been put into the till. The prisoner upon this evidence was found guilty, and received sentence of transportation; but a case was reserved for the opinion of THE TWELVE JUDGES, Whether, as Mr. *Tilt* had divested himself of this money by giving it to *Mary Hill*, who had given it to her servants in the manner and for the purpose above described, and as it did not appear that the prisoner had, on receiving it from them, put it into the till, or done any thing with it that could be construed a restoring of it to the possession of his master, the converting of it to his own use by putting it into his pocket, could amount to the crime of larceny, it being essential to the commission of that offence that the goods should be taken from *the possession* of the owner; and, although no opi-

See 2 East's P. C. 572, *notis.*

nion was ever publicly delivered upon this case, the prisoner was discharged (*a*).—After these determinations, it cannot be contended that the possession of the servant is the possession of the master; for, independently of these authorities, the rule, that the possession of the servant is the possession of the master, cannot be extended to a case in which the property never was in the master's possession, however it may be so construed in cases where the identical thing stolen is delivered by the master, or where the question is between the master and a third person. "If," says *Sir Matthew Hale*, "I deliver my servant a bond to receive money, or deliver goods to him to sell, and he receives the *money* upon the bond or goods, and go away with it, this is not felony; for though the bond or goods were delivered to him by the master, yet the money was not delivered to him by the master:" but he admits, that "if taken away from the servant by a trespasser, the master may have a general action of trespass;" which shews that the law, in a criminal case, will not, under such circumstances, consider the master to have a *constructive possession* of the property. Such a possession arises by mere implication of law; and it is an established rule, that no man's life shall be endangered by any intendment or implication whatsoever.

1 Hale P. C. 668.

SECONDLY, Supposing the prosecutor to have had *the possession* of this note, yet the prisoner, under the circumstances of this case, cannot be said to have tortiously taken it from that possession with a felonious intent to steal it. It may be said that this was a fact for the opinion of the Jury, and that they have found by the verdict of "Guilty," that he did take it with that design; but a special case, saved for the opinion of the JUDGES, brings under their consideration all the *evidence* that was given at the trial, in the same manner as a spe-

(*a*) On the consultation among the JUDGES on this case, they were of opinion that *Bull* was not guilty of felony, but only of a breach of trust; the money never having been put into the till, and therefore not having been in the possession of the master as against the defendant; and *Rex v. Waite*, *ante*, page 28. Case 14. was very mainly relied on to shew that this was a mere breach of trust. 2 East P. C. 572.

1799.

BAZELEY'S CASE.

cial verdict would have brought forwards all the *facts* found therein; for it is said by MR. JUSTICE GROSE, in reporting the opinion of the JUDGES in the case of *Rex* v. *Brown* and *Parkes*, at the Old Bailey, that in a criminal case it is never too late to review the circumstances of it (1); and in that case the evidence of the intention with which *Brown* had uttered the note, and of his knowledge of its having been forged, formed part of the judgment given thereon. In the present case there was no evidence whatever to shew that any such intention existed in his mind at the time the note came to his hands; and if so, it is within the principles laid down in the case of *Rex* v. *Charlewood* (2). Besides, the prisoner had given a bond to account faithfully for the monies that should come to his hands; he was the agent of a trading company, and had the means of converting bills into cash, which would have enabled him, at the time, to repay to the prosecutor the 100*l.* which he *detained for his own use*; but if, at the very time he received the note, he had no intent to steal it, it is no felony; for *Sir Edward Coke* (3), and all the writers on Crown Law agree, that the intent to steal must be when the property comes to his hands or possession; and that if he have the possession of it once lawfully, though he hath the *animus furandi* afterwards, when he carrieth it away, it is no larceny.

(1) The same is also declared by MR. JUSTICE BULLER, in delivering the opinion of the Judges in the case of REX v. Tilley, *ante*, page 662.

(2) *Ante*, page 409. Case 189.

(3) 3 Inst. 107.

BUT, THIRDLY, the situation which the prisoner held, and the capacity in which he acted in the banking-house of the prosecutors, make this transaction only *a breach of trust*. It appears from the paragraph already cited from *Hale's Pleas of the Crown*, that in consequence of the relation between master and servant, the law makes a distinction between civil and criminal proceedings, that the servant may be liable to an action for wrongfully withholding the property he may have received to his master's use; but that he cannot be proceeded against criminally for detaining or converting to his own use such property as he may have received *in trust* for the use of his master: and this distinction is strongly implied in the case of *Clarke* v. *Shee* (4). There one *David Wood*, who was clerk to the plaintiff, a brewer, had received money from

(4) Cowp. Rep. 198.

1799.

BAZELEY'S CASE.

the plaintiff's customers, and also negotiable notes for the plaintiff's use, in the ordinary course of business, and had paid several sums of the said money, and several of the notes, at different times, to the amount of 459*l.* 4*s.* 4*d.* to *Shee*, the defendant, upon the chance of the coming up of tickets in the State-Lottery. The action was brought to recover back this money; and on the evidence of *Wood*, the plaintiff, obtained a verdict for the whole sum, in an action on the case, subject to the opinion of the Court, 1st, Whether *Wood* was a competent witness? and 2dly, Whether the plaintiff was entitled to recover? And the plaintiff had judgment. The circumstances of that case are precisely similar to the circumstances of the present case. No idea was entertained that *Wood* was liable to be indicted for a felony in having converted this property; and he was admitted a witness, on receiving *a release* from the plaintiff, which shews that it was considered *a breach of trust* only, and that he was only liable to his master in a civil action for the amount. This doctrine is expressly laid down in *Bacon's Abridgement* (1). "The contract whereby he becomes a servant, implies no more than an undertaking for his care and obedience; and whatever he does in his master's affairs, it is but in consequence of that original contract, and therefore cannot be extended further; and since, when he first contracted, it was an undertaking for no more than his own care and fidelity, his interference in his master's affairs is under that general undertaking, and by consequence he cannot be charged *but for deficiency* in point of care, or of *faithfulness*."

(1) Bac. Abr. 4 vol. "Master and Servant," p. 588. 5th edition.

FOURTHLY. But *a breach of trust* is not, either by the Common Law or by Act of Parliament, in this case, felony. In the case of *Rex* v. *Meers* (2), it is laid down, that if there be such a consent of the owner of the property as argues *a trust* in the prisoner, and gives him a possession against all strangers, then his breaking that trust, or abusing that possession, though to the owner's utter deceit of all his interest in those goods, it will not be felony: and this rule is confirmed by the case of *Rex* v. *Waite* (3), where *John Waite*, a cashier of the Bank, a situation precisely similar to that which the present prisoner

(2) 1 Show. 49.

(3) *Ante*, page 28. Case 14.

1799.

BAZELEY'S CASE.

held in the banking-house of the prosecutors, was indicted for stealing six India bonds, which had been paid to him as cashier by the Accountant-general of the Court of Chancery; and upon this case being argued on the ground that this was only *a breach of trust*, the Court was clearly of opinion that the offence was not felony. To confirm this decision, the case of *Rex* v. *Meers* might again be cited, where it was held, that the *breach of trust* in stealing goods from a ready-furnished lodging was not larceny at the common law; and the principle of this decision was confirmed in the case of *Rex* v. *Charles Palmer* (1), argued before all the JUDGES in June 1795. Taking it, therefore, as a settled point, that a *breach of trust* cannot, by the rules of the *common law*, be converted into a felonious taking, the next and last inquiry will be, in what cases the Legislature has made this particular breach of trust felony. There are only four statutes upon this subject, *viz.* the 21 Hen. VIII. c. 7. the 15 Geo. II. c. 13. s. 12. the 5 Geo. III. c. 35. s. 17. and 7 Geo. III. c. 50. The two last Acts relate entirely and exclusively to breaches of trust committed by servants employed in the business of *the Post-Offices*; and the second to breaches of trust committed by servants employed in the business of *the Bank of England*, and of course, cannot affect, in any manner whatever, the present case. Nor can the case of the prisoner be construed within the statute 21 Hen. VIII. c. 7. which enacts, "That all and singular servants to whom any caskets, jewels, money, goods, or chattels, by his or their masters or mistresses, shall be delivered to keep, that if any such servant or servants withdraw themselves from their masters or mistresses, and go away with the caskets, &c. or any part thereof, to the intent to steal the same, and defraud his or their masters or mistresses thereof, contrary to the trust and confidence in him or them put by his or their masters or mistresses; or else being in the service of his or their masters or mistresses, without any assent or command of his master or mistress, embezzle the same casket, jewels, money, goods, or chattels, or any part thereof, or otherwise convert the same to his own use, with like purpose to steal it, it shall be adjudged felony:" for it has been deter-

(1) *Ante*, page 680. Case 284.

1799.

BAZELEY'S CASE.

mined upon this statute, that it is strictly confined to such goods as are *delivered* by the master to the servant to *keep*. But this Bank-note, as has been already shewn, was not in the possession of the master, and therefore it cannot have been *delivered* by him; it being impossible for a man to deliver, either by himself or his agent, a thing of which he is neither actually nor constructively possessed; but, even admitting that it had been in the master's possession, and delivered by him to the prisoner, it would not have been delivered to him *to keep*, but for the purpose of entering it faithfully in the book, and handing it over to the Bank-note cashier. The authorities, however, are still stronger upon this point of the case; for it is said by *Sir William Staundford*, *Sir Edward Coke*, *Hale*, and *Hawkins*, in their comments upon this statute, "that a receiver, who, having received his master's rents, runs away with them; or a servant, who, being entrusted to sell goods, &c. departs with the money; is not within the statute (1)." So also, that it does not extend to the taking of such things whereof the *actual property* is not in the master at the time; and, therefore, that if a servant, having money or corn delivered to him, melt down the money of his own head, without the command of his master, into a piece of plate, or turn the corn into malt, and then run away with them, he is not within the statute (2). It has been decided that a *bond* is not goods, because it is a *chose in action* (3); and a *Bank-note* is a *chose in action*; and therefore, also, the prisoner's case is not within this statute; and, indeed, the statute 2 Geo. II. c. 25. which makes the stealing of Bank-notes felony, being subsequent to the 21 Hen. VIII. c. 7. is also another reason why the stealing Bank-notes is not within this Act.

Staundf. 25. 1 Hale 668. 1 Hawk. c. 33. s. 12. Sum. 63. Dalt. c. 58. 3 Inst. 105.

(1) 4 Bac. Abr. 590.

(2) Dalton, c. 102. But see H. P. C. c. 33. s. 15. *contrà*.

(3) Dyer, 5. b. Calye's Case. 8 Co. 33.

FIELDING, *for the Crown*, argued the case entirely on the question, Whether the prosecutors, *Esdaile* and *Hammett*, had such a constructive possession of the Bank-note as to render the taking of it by the prisoner felony? He insisted, that in the case of personal chattels, *the possession* in law follows the right of property; and, that as *Gilbert*'s clerk did not deposit the notes with *Bazeley* as a matter of trust to him; for they were paid at the counter, and in the banking-house

1799.

BAZELEY'S CASE.

of the prosecutors, of which *Bazeley* was merely one of the organs; and, therefore, the payment to him was in effect a payment to them, and his receipt of them vested the property *eo instanter* in their hands, and gave them the legal *possession* of it. He said that this case was distinguishable from the case of *Rex* v. *Bull*, inasmuch as *Bull* had authority to sell the goods of his master, and was only accountable to him for the monies he received for them; but that Bank-notes could not be considered articles of dealing, and *Bazeley* had no authority to dispose of any from the shop; and from the case of *Rex* v. *Waite*, inasmuch as the India bonds in that case were a personal deposit with *Waite*, as one of the cashiers, pursuant to the directions of the statute 12 Geo. I. c. 32. which designates the person and character with whom the bonds are to be placed, namely with the *cashier of the Bank*; and he cited the cases of *Rex* v. *Abrahat* (1), and *Rex* v. *Spears* (2), to shew that a servant may be guilty of larceny, upon the principle that the possession of the servant is to be considered as the possession of the master.

(1) *Ante*, p. 824. Case 306.

(2) *Ante*, p. 825. Case 307.

THE JUDGES, it is said, were of opinion, upon the authority of *Rex* v. *Waite*, that this Bank-note never was in the legal custody or possession of the prosecutors, Messrs. *Esdailes* and *Hammett*; but no opinion was ever publicly delivered (*a*); and the prisoner was included in the Secretary of State's letter as a proper object for a pardon.

(*a*) On consultation among the Judges, some doubt was at first entertained; but at last all assembled agreed that it was not felony, inasmuch as the note was never in the possession of the bankers, distinct from the possession of the prisoner: though it would have been otherwise if the prisoner had deposited it in the drawer, and had afterwards taken it. *(Vide Chipchase's Case, ante*, p. 699.*)* And they thought that this was not to be differed from the cases of *Rex* v. *Waite*, *ante*, p. 28. and *Rex* v. *Bull*, *ante*, p. 841. which turned on this consideration, that the thing was not taken by the prisoner out of the possession of the owner: and here it was delivered into the possession of the prisoner. That although to many purposes the note was in the actual possession of the masters, yet it was also in the actual possession of the servant, and that possession not to be impeached; for it was a lawful one. EYRE, C. J. also observed that the cases ran into one another very much, and were hardly to be distinguished;

1799.

BAZELEY'S CASE.

But in consequence of this case the statute 39 Geo. III. c. 85. was passed, entitled, "An Act to protect Masters and others against Embezzlement, by their Clerks or Servants;" and after RECITING, that whereas Bankers, Merchants, and others, are, in the course of their dealings and transactions, frequently obliged to entrust their servants, clerks, and persons employed by them in the like capacity, with receiving, paying, negotiating, exchanging, or transferring money, goods, bonds, bills, notes, bankers' drafts, and other *valuable effects* and securities; that *doubts* had been entertained, whether the embezzling the same by such servants, clerks, and others, so employed by their masters, amounts to felony by the laws of England; and that it is expedient that such offences should be punished in the same manner in both parts of the United Kingdoms;" IT ENACTS AND DECLARES, "That if any servant or clerk, or any person employed for the purpose in the capacity of a servant or clerk (*a*) to any person or persons whomsoever, or to any body corporate or politic, shall, by virtue of such employment, receive or take into his possession any money, goods, bond, bill, note, banker's draft, or other valuable security or effects, for or in the name, or on the account of his master or masters, or employer or employers, and shall fraudulently embezzle, secrete, or make away with the same, or any part thereof; every such offender shall be deemed to have feloniously stolen the same from his master or masters, employer or employers, for whose use, or in whose name or names, or on whose account, the same was or were delivered to, or taken into the possession of, such servant, clerk, or other person so employed, although such money, &c. was or were no otherwise received into the possession of such master

That in the case of *Rex* v. *Spears*, *ante*, p. 825, the corn was in the possession of the master under the care of the servant: and LORD KENYON said that he relied much on the Act of Parliament respecting the Bank not going further than to protect the Bank. 2 East, C. L. 574.

(*a*) See also 52 Geo. III. c. 63. by which the offence of embezzlement is extended to bankers, merchants, brokers, attornies, agents, of any description whatsoever, as to certain descriptions of property entrusted to their care, and 50 Geo III. c. 59. as to embezzlements by collectors of the public monies, and the case of *Rex* v. *Walsh*, 4 Taunton's Rep. 266.

1799.

BAZELEY'S CASE.

or masters, employer or employers, than by the actual possession of his or their servant, clerk, or other person so employed (*a*); and every such offender, his adviser, procurer, aider or abettor, shall be liable to be transported for any term not exceeding fourteen years, in the discretion of the Court (*b*)."

(*a*) One Jones was convicted at Winton Spring Assizes 1800, for larceny at Common Law in stealing wearing apparel from his master, and it was contended that under the above Act there must be judgment of transportation; but Mr. Justice Lawrance and Mr. Serjeant Palmer, who tried the prisoner, were both of opinion that in order to found a judgment on this statute the indictment must be specially drawn so as to bring the case within it. 2 East, P. C. 576. See Rex *v.* John M'Gregor, O. B. September Session, 1801, *post*.

(*b*) At the Old Bailey in April Session 1800, *John Patinson* was convicted on this statute, for embezzling one shilling and fourpence as the servant to *Barnjum* and *Raindon*. On the 15th March 1800, he carried, on account of his master, household goods, belonging to one *Roach*, for the carriage of which *Roach* paid him three shillings and six-pence; but he only accounted for two and two-pence.

CASE CCCXII.

THE KING *against* ROBERT MUNDAY.

A person who procures possession of a house under a *written agreement* between him and the landlord for A LEASE of twenty-one years, with a fraudulent intention to *steal* the fixtures thereto belonging, is, by stealing the lead affixed to the house, guilty of larceny on the statute 4 Geo. II. c. 32. S. C. 2 East, 594.

AT the Old Bailey in February Session 1799, *Robert Munday* was indicted on the statute 4 Geo. II. c. 32. for stealing, on the 1st January preceding, 200 Cwt. of lead, the property of *James Newey* and *David Betson*, fixed to a house and building. There were five other counts, laying the house and building to belong, FIRST, to *Joseph Manton*, in right of his wife; and, SECONDLY, to her sister, *Susannah Aitkens*.

THE house from which this lead was taken was situate in *Great Ormond-street*, and belonged to the wife of *Joseph Manton*, a gun-maker, in *Davis-street*, and to her sister, *Susannah Aitkens*; but the rent of it was received by *James Newey* and *David Betson*. On the 31st of December 1798, the house, which was then under the care of one *Peter Gray*, who was in possession, it being then to let, the prisoner called on Mr. *Manton*, saying that he had seen the house that was

1799.

MUNDAY'S CASE.

to be let in *Great Ormond-street*, and desired to know the rent of it. Mr. *Manton* told him that it was sixty pounds a year. The prisoner replied, that it was too much; for that, besides the disagreeable circumstance of its being next door to a baker's shop, it was so much out of repair, that it would require 100*l.* to be laid out upon it before it would be tenantable; but that, if he would take 55*l.* a year for it, he would take it on a lease for twenty-one years, provided he could have immediate possession of it, to put in the workmen in order to get it ready for the reception of his son, who had been twenty years in India, where he had married a black woman with a large fortune, and whose arrival, with a large family of children and servants, he was in hourly expectation of. Mr. *Manton* agreed to take 55*l.* a year for the house for twenty-one years, and promised to procure an agreement for a lease for that term, to be drawn up between them to that effect; but on the prisoner's affecting an anxiety to have the business settled immediately, Mr. *Manton* undertook to draw it up himself, and for that purpose requested the prisoner would favour him with his name and address. The prisoner accordingly told him that his name was *Robert Munday*; and that he had a house at *Tottenham High-cross*, where he went every night to sleep; and as he appeared, from the elegance of his dress and manner, to be a person of property and respectability, Mr. *Manton* gave credit to his assertion, drew up the agreement on unstamped paper, and gave it to him to sign. The prisoner read it over very deliberately, seemed much pleased with it, and said it would save him the expence of applying to an attorney on the occasion. At this time *Peter Gray*, the person who was in possession of the house, came into Mr. *Manton*'s shop; and *Manton*, telling him that he had let the house to that gentleman (pointing to *Robert Munday*), inquired whether he could leave it on the ensuing day; to which *Gray* replied, that he was uncertain whether he could quit it so soon. The prisoner then signed the agreement in the name of *R. Munday*, and went away. On the same evening, *Gray*, in pursuance of *Manton*'s request, procured a lodging for himself, and took away part of his things

1799.

MUNDAY'S CASE.

from the house in *Great Ormond-street*. On the ensuing day, the 1st January 1799, *Gray*, as he was returning from his lodgings to the house with a cart to fetch away the remainder of his things, met *Munday*, and told him that he was going to leave the house; upon which *Munday* thanked him for the expedition with which he had provided another apartment, and desired him to leave the key of the house at the baker's shop; and he accordingly left the key at Mr. *Clark's*, the baker, at the express desire of the prisoner, from whence the prisoner took it, and by these means got into possession of the house. At this time the leaden sinks in the wash-house and kitchen, and the leaden pipes against the back part of the house, were all safe and in good order. On the 4th of January Mr. *Manton* conceiving that he had got a good tenant, and wishing to have the lease drawn up and executed immediately, sent a person to *Tottenham High-cross* to speak with his tenant on that subject; but the messenger not being able to find any person of the name of *Munday* at that place, or in the neighbourhood, *Manton* went, on the 9th of January, to *Tottenham High-cross* himself, but with no better success. On his return to town, he sent *Gray* and two other men to the house in *Great Ormond-street* with a second key, which he had retained and never delivered to *Munday*, in order to look into the state of the premises, and to fasten all the doors with padlocks, so as to prevent *Munday* from getting in by means of the key which he had taken from the baker's. It was at this time quite dark; but on procuring lights, and going into the hall, they discovered *Munday*, clothed in a shabby working-dress, coming from the back kitchen; and during some conversation, in which he talked of having brought chairs and other furniture into the house, but none were found, he got them near to the street-door, gave them a quick shove, shut them and himself out, and walked away. *Gray* and his companion returned to Mr. *Manton*, who, on hearing their account, went immediately to *Bow-street*, and returned with two peace-officers to *Great Ormond-street*, where they observed the prisoner, and secured him, just as he was entering the house. On examination, it

1799.

MUNDAY'S CASE.

appeared that the lead roof on the top of the house, the leaden pipes at the back of the house, and the lead of the sinks in the back kitchen and wash-house, were ripped off, and part of the property taken away, as were also the locks from the doors of all the rooms; and on the prisoner's person were found a ripping chissel, and the two keys of the house. The prisoner in his defence said, that although he was not a lawyer, he had always understood that where there was an agreement between a lessor and a lessee for a lease, in which there was a covenant to repair the demised premises, although no certain sum of money was therein expressed, it was the estate and property of the lessee while the rent was paid; that upon the present occasion, he had acted under that idea, and was proceeding to repair the house; and that, as his wife and family at that time lived at a Mr. *Field*'s, in *Church-street, Stoke-Newington*, and were going in a few days to live at *Tottenham High-cross*, he had given Mr. *Manton* a direction to the latter place; but he denied that he had any intention to steal the lead; and insisted, that under such articles as subsisted between him and Mr. *Manton*, the taking the property could not, under any circumstances, be legally construed felony.

THE jury said that they were of opinion that he had entered into the contract with Mr. *Manton* for the purpose of getting a fraudulent possession of the house, and found him guilty of the charge laid in the indictment.

BUT the judgment was respited, and the case was reserved for the opinion of the JUDGES.

No opinion was publicly delivered; but the prisoner continued in Newgate until the end of the May Session following, when he was sentenced to pay a fine of one shilling, and to be imprisoned for two years in the house of correction.

1799.

CASE CCCXIII. THE KING *against* FLEMMING *and* WINDHAM.

On an indictment for a rape, *the deposition* of the girl taken before the committing magistrate, and *signed by him*, may, after her death, be read in evidence at the trial of the prisoner, although it was not *signed by her*, and she was under twelve years of age; provided she was *sworn*, and appeared competent to take *an oath*: and all the facts necessary to complete the crime may be collected from her testimony so given in evidence.
S.C. 1 East, 440.

AT the Lent Assizes held at THETFORD, on Monday 18th March 1799, for the county of *Norfolk*, *James Flemming* and *Samuel Windham*, the first a serjeant and the second a corporal in the 34th regiment of foot, were tried before JAMES MINGAY, Esq. on an indictment charging them with having on 29th July 1798, at *Fundenhall* in the said county, committed a rape on the body of *Rebecca Beighton*, a girl of between eleven and twelve years of age.

EDWARD BEIGHTON, the father of the girl, was a farmer residing at *Fundenhall* in *Norfolk*. On the evening of the day laid in the indictment he went to the King's-head public-house at *Ashwellthorpe*, to which place his daughter followed him. The two prisoners, and one *William Bynton*, a private in the same regiment, were at this time sitting in the room. The girl went to walk in the garden belonging to the house; the two prisoners followed her out; and *Bynton*, who had some suspicion of their intention, followed them in order to watch their motions; and he saw all that passed; and from his evidence, and the evidence of the surgeon who examined the girl, and also of her father and mother, it appeared that both the prisoners had been connected with the girl against her will, and that they had penetrated her body; but as the girl had died on the 4th March in the following year, there was no evidence that either of them had emitted during the coition. The surgeon who examined both the girl and the prisoners, deposed that the two prisoners were diseased with a lues; and that there was a discharge from the girl which afterwards appeared to be venereal; but that although this complaint must have been communicated by connection with man, it might have been communicated without any emission having taken place. It also appeared, that the girl, the two prisoners, and the witness *Bynton*, were on the 2d August taken before *Roger Kerrison*, *Esq.* a magistrate for the county of *Norfolk*; that the girl, upon being examined as to her

1799.

FLEMMING AND WINDHAM'S CASE.

knowledge of the nature of an oath, and appearing to be a competent witness, was sworn; that what she deposed on her oath was reduced into writing; that the deposition when finished was deliberately read over to her; that all this passed in the presence of the prisoners; that both they and the girl understood her deposition perfectly well; that the examination of the prisoners was taken without their being sworn; that it was reduced into writing; that both the examination and the deposition were signed by the magistrate, but that the examination was not signed by the prisoners, or by either of them, nor was the deposition signed by the girl. The examination of the prisoners was not read in evidence.

THE COUNSEL *for the prisoners* objected to the deposition of the girl being read, and contended that such depositions were in no case evidence; but that if they were wrong in that idea, the deposition in the present case was certainly inadmissible, because she had not signed it.

THE LEARNED JUDGE, however, thought that her deposition, taken under the circumstances above described, was evidence, although it was not signed by the deponent, as it did not appear that the statutes of Philip and Mary require such a signature to render it authentic; and it was accordingly read to the Jury.

See the Case of Benjamin Lambe, *ante*, page 552. Case 249.

THE Judge left it to the Jury to determine, FIRST, Whether the prisoners, or either, and which of them, had been connected with the girl without her consent and by force: SECONDLY, Whether the crime had been completed by penetration and emission (*a*): THIRDLY, That they might collect the fact of emission from other evidence, though the unfortunate girl was dead, and could not therefore give any farther account of the transaction than what was to be found in her deposition before the magistrate: and FOURTHLY, he particularly pointed out to them the contradiction between the girl's deposition and *Bynton*'s evidence, as to his, or a third man having been connected with her; and desired them

(*a*) Upon this point of the law see the cases and reasonings stated by Mr. East, 1 vol. Pleas Crown, ch. 10. sect. 8.

1799.

FLEMMING AND WINDHAM'S CASE.

to weigh *Bynton's* testimony cautiously, and to see whether and how far his testimony was corroborated, and what credit was due to the whole or any part of it, as it was manifest that he had connived at the guilt of the prisoners, if he did not perpetrate the crime imputed to them himself.

THE Jury, after a short consultation, found both the prisoners guilty; but the Judge reserved the case for the opinion of THE TWELVE JUDGES, on the following questions:

FIRST, Whether there was proper evidence, in the absence of the girl, to be left to the Jury, touching the completion of the time?

SECONDLY, Whether the deposition of *Rebecca Beighton*, the deceased, was evidence at all, even if it had been signed by her?

THIRDLY, Whether, as it was not in fact signed by her, it ought to have been given in evidence?

THE TWELVE JUDGES assembled on the first day of Trinity Term 1799, to consult upon this case; and they were of opinion, that the prisoners were properly convicted, and that all the points had been properly determined at the Assizes.

CASE CCCXIV.

THE KING *against* JAMES SMITH.

An indictment on the statute 15 Geo. II. c. 28. s. 2. to warrant *a year's imprisonment*, must state the charge in *one count*.

S. C. 1 East, 183.

AT the Summer Assizes at *Maidstone*, in the year 1799, *James Smith* was tried before MR. JUSTICE BULLER, on the statute 15 Geo. II. c. 28. s. 2. on an indictment found at the preceding Lent Assizes for the county of *Kent*.

THE indictment consisted of *two counts*. The first count stated, that at the General Session of Oyer and Terminer, holden at *Maidstone* in the year 1795, before SIR ARCHIBALD MACDONALD, KNT. Chief Baron, and SIR RICHARD PERRYN, KNT. Baron, &c. *James Smith* was in due form of law tried and convicted upon a certain indictment then depending against him, together with one *Robert Skeey*, for that they, on the 15th day of April 1795, had unlawfully,

unjustly, and deceitfully, uttered a counterfeit sixpence to *Sarah Martin*, and, on the same day, another counterfeit sixpence to *Mary Woodmason*, they, the said *James Smith* and *Robert Skeey*, knowing the said sixpences to be false and counterfeit, and at the same time having in their custody and possession one other counterfeit sixpence, knowing the same to be false and counterfeit; and that it was thereupon ordered and adjudged by the said Court, that the said *James Smith* should be imprisoned in *Maidstone* gaol for one year, and until he should find sureties for his good behaviour for two years more: And then THE SECOND COUNT charged, that he the said *James Smith*, late of the parish of *Patrixbourne*, in the said county of *Kent*, labourer, *being a common utterer of false money*, afterwards, that is to say, on the 23d August in the 38th year, &c. with force and arms, at the parish aforesaid, in the county aforesaid, one piece of false and counterfeit money, made and counterfeited to the likeness and similitude of a piece of good, lawful, and current money and silver coin of this realm, called AN HALF CROWN, as, and for, a piece of good, lawful, and current money and silver coin of this realm, called AN HALF CROWN, then and there unlawfully, unjustly, deceitfully, and *feloniously*, did utter to one *John Fearman*, he, the said *James Smith*, at the time when he so uttered the said last-mentioned piece of false and counterfeit money, then and there well knowing the same to be false and counterfeit; in contempt of our said Lord the King and his laws; to the evil example, &c.; against the statute, &c.; and against the peace, &c."

GURNEY, *for the defendant*, took an objection to this indictment for *the felony*, upon the ground of an informality in the indictment for *the misdemeanor*, of which the defendant had been convicted in 1795, and of the judgment which had been pronounced upon that indictment, inasmuch as the uttering to *Sarah Martin* was charged in the first count of the said indictment, and the subsequent uttering to *Mary Woodmason* was charged in the second count, which, he contended, rendered the indictment erroneous; for that it had been determined by THE TWELVE JUDGES in *Elizabeth Tandy's case* (1), that such an indictment must contain some one count to war-

(1) *Ante*, page 833. Case 810.

1799.

SMITH'S CASE.

rant the judgment of *one year's* imprisonment; so that upon the former indictment, the judgment ought only to have been *six months'* imprisonment, instead of twelve: and therefore, as the judgment for twelve months was improper, and the record manifestly erroneous, it could not be made use of as a foundation upon which this charge of felony could be built.

MR. COMMON SERJEANT, *for the Crown*, suggested that the indictment for the misdemeanor in 1795 was prior in date to the decision of *Elizabeth Tandy's case*; but

MR. JUSTICE BULLER replied, that the law was the same at one time as at another, and directed the Jury to acquit the defendant of the present charge. But he ordered him to be detained, that the Solicitor for the Mint might prefer an indictment for the misdemeanor, which was done accordingly; and the prisoner, *James Smith*, was tried upon it the next day.

An indictment on the 15 Geo. II. c. 28. for uttering counterfeit money, having at the same time other counterfeit money in custody, is good, although it do not allege the offender to be *a common utterer of false money*.

S. C. 1 East, 182, 183, and see Michael Michael's Case, *post*.

THIS indictment charged, That *James Smith*, late of the parish of *Patrixbourne* in the county of *Kent*, labourer, on the 23d August, in the 38th year, &c. with force and arms, &c. one piece of false and counterfeit money, made and counterfeited to the likeness and similitude of a piece of good, lawful and current money and silver coin of this realm, called AN HALF-CROWN, as and for a piece of good, lawful and current money and silver coin of this realm, called AN HALF-CROWN, then and there unlawfully, unjustly and deceitfully did utter to one *John Fearman*, he, the said *James Smith*, at the time he so uttered the same piece of false and counterfeit money, then and there well knowing the same to be false and counterfeit. AND ALSO that he, the said *James Smith*, at the time when he so uttered the said piece of false and counterfeit money as aforesaid, to wit, on the said 23d day of August, in the 38th year, &c. had about him the said *James Smith*, in the custody and possession of him the said *James Smith*, one other piece of false and counterfeit money, made and counterfeited to the likeness and similitude of a piece of good, lawful and current money and silver coin of this realm, called AN HALF CROWN, he, the said *James Smith*, then and there well knowing the said last-mentioned piece of false and counterfeit money to be false and counterfeit, in contempt of

our said Lord the King, &c. to the evil example, &c. against the form of the statute, &c. and against the peace, &c." and on this indictment the prisoner was convicted; but

GURNEY, *in arrest of judgment*, moved, that the indictment was defective, inasmuch as it did not aver in terms, that the defendant was "*a common utterer of false money.*"

MR. JUSTICE BULLER reserved the point for the consideration of THE TWELVE JUDGES; Whether on this form of indictment the defendant was liable to suffer the greater punishment inflicted by 15 and 16 Geo. II. c. 28. s. 3. or only the lesser one provided by the second section of that Act; in other words, whether to bring the case within the third section, the indictment should not have concluded with a distinct averment that the defendant was *a common utterer of false money*; or whether that was not the necessary conclusion of law from the facts stated.

IN Hilary Term 1800, the case was argued in the Exchequer Chamber by FIELDING *for the Crown*, and GURNEY *for the defendant.*

GURNEY contended that the crime created by the statute 15 Geo. II. c. 28. was that of being *a common utterer of false money*, and that the utterance, and possession at the time of uttering other counterfeit coin, were only the ingredients of which the crime was composed; that the statute, in creating an offence and giving it a name, made that name technical, and imposed on the prosecutor the necessity of stating it in terms; and that no statement of facts, no periphrasis or circumlocution could supply its place. He argued by analogy to the case of murder, that although an indictment for murder states the mortal wound, the intention with which it was given, the malice aforethought, the consequence of the blow, the death of the party, and all the other ingredients to constitute murder, still the indictment would be bad if the word "murder" were omitted; for that every indictment for that offence must conclude, "that the said *A*, the said *B*, then and there, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and *murder.*" In the case of perjury it was the same: the indictment states the existence of a judicial proceeding, the appear-

1799. SMITH'S CASE.

ance of the party indicted as a witness, the oath taken, the authority of the Magistrate to administer the oath, the false testimony given, the materiality of the point on which that false testimony was given, the wilful and corrupt intention with which it was given, the falsity of it, and every thing necessary to constitute the crime of perjury; but that it concludes, and necessarily must conclude, "and so the said *A*, &c. did commit wilful and corrupt *perjury*." He contended that, although the fact of being *a common utterer* of false money was a conclusion of law, that circumstance did not weaken or even affect his argument; for that *murder* and *perjury* were also conclusions of law, and yet those crimes must be expressly stated *eo nomine* in the indictment; that it was the more necessary to be strictly correct in an indictment on the present statute, because the fact of the offender being *a common utterer of false money* was the foundation on which a proceeding for a capital felony was to be raised; and that the words of the statute respecting that capital felony which was so to be raised, fortified his argument, *viz.* "And if any person, having been once so convicted *as a common utterer of false money*, shall afterwards, &c." This was the description of the offence, and a record for felony could not state that a person had been convicted *as a common utterer of false money*, when no such terms were to be found in the indictment upon which he had received judgment; and he suggested that the proper averment ought to have been, "And so the Jurors aforesaid, upon their oath aforesaid, do say that the said *James Smith* then and there, to wit, &c. by means of the premises aforesaid, *became and was a common utterer of false money*."

FIELDING, *for the Crown*, contended that the fact of the prisoner being *a common utterer of bad money*, was a necessary *conclusion of law*, and that therefore it was not incumbent on the Crown to aver that fact expressly in an indictment on this statute; for that the words being "shall be deemed and taken to be a common utterer," the word *deemed* was equivalent to *adjudged*, and that the crime was the uttering the false money; so that every fact necessary on such an indictment was stated in the present case.

1799.

SMITH'S CASE.

MR. JUSTICE HEATH, at the Lent Assizes 1800 did not publicly and formally deliver the opinion of the Judges, but intimated to the Bar that the Judges were of opinion that the indictment was sufficient (*a*): upon which the defendant, *James Smith*, together with one *Benjamin Levi*, who was indicted, under the like circumstances, for a similar offence, were sentenced to be imprisoned for *one year*, to be computed from 15th July 1799, and to find security for *two years* more, to be computed from the end and expiration of the said one year.

(*a*) In Hilary Term 1800, THE JUDGES, upon search of precedents for many years back, finding that judgment had been given for the greater punishment upon indictments drawn in this form, although some were to be found containing the averment in question, held that such averment, though it would not hurt, was not necessary in order to warrant the greater punishment. S. C. 1 East, 184.

THE KING *against* ELIZABETH SULLS.

CASE CCCXV.

An indictment for larceny, laying the goods stolen to be the property of *Victory Baroness Turkheim*, is good, although her name is *Selina Victoire*.

AT the Old Bailey in January Session 1800, *Elizabeth Sulls* was tried on an indictment which stated "That she, on the 31st August 1799, one counterpane, of the value of seven shillings and sixpence, of the goods and chattels of *Victory Baroness Turkheim*, feloniously did steal, take and carry away, &c." There were two other indictments against her: one for stealing three sheets on 24th December 1799; and another for stealing a pair of cotton stockings, on the 28th of the same month, both of them laying the goods to be the property of *Victory Baroness Turkheim*.

THE prisoner was the servant of the prosecutrix, an Alsatian lady, living in *Blandford-street*, near *Portman-square*. The prosecutrix said that *Baroness Turkheim* was her title only, and no part of her proper name; but that she was not only reputed to possess that title, but did actually possess it in right of an estate inherited from her father; that she was constantly so called, and had constantly and uniformly acted

1799. SULLS'S CASE.

in and been known by that appellation; that she was a single woman, a native of *Alsace;* and that her name, without her title, was *Selina Victoire.* The facts of the prisoner having stolen the counterpane, and that it was the property of the prosecutrix, were very clearly proved.

KNOWLYS, *for the prisoner,* contended that the prosecutrix was not sufficiently named in the indictment; and he cited the case of *Rex* v. *Mary Graham* (1).

(1) *Ante,* page 547. Case 207.

THE COURT said that it was not necessary that there should be any *addition* to the name of a prosecutor or prosecutrix in an indictment; that all the law requires upon this subject is certainty to a common intent; and that as the prosecutrix, upon the present occasion, had always acted in and been known by the appellation *Baroness Turkheim,* and could not possibly be mistaken for any other person, it must be taken to be her name, and that therefore the indictment had named her with sufficient certainty; and referred to the doctrine laid down on this subject in *Hawkins's Pleas of the Crown,* bk. 2. c. 25. s. 72; but

THE judgment was respited on this objection, and the point was saved for the consideration of THE JUDGES.

THE RECORDER, at the close of the ensuing Session, said, THE JUDGES had taken this case into their consideration, and that they were of opinion that the indictment was sufficient: and the prisoner was sentenced to be transported for the term of seven years.

1800.

CASE CCCXVI.

THE KING *against* DEAKIN AND SMITH.

If a stage-coach be robbed of a parcel which was intended to be conveyed from one place to another, the things stolen may be laid to be the property of *the coachman.* S. C. 2 East's C. L. 653. Taylor's Case, *ante,* page 356. Case 178.

AT the Old Bailey in April Session 1800, *James Deakin* and *William Smith* were tried before MR. JUSTICE GROSE for stealing on 20th November 1799, a great variety of articles, which were laid in the FIRST COUNT to be the property of *William Mountain, John Wallis, Joseph Bull, Thomas Henney, Eusebius Danby,* and *Richard Miller;* in the SECOND to be

1800.

DEAKINS'S CASE.

the property of *Thomas Dancer Markham*; and in the THIRD to be the property of *persons unknown*.

IT appeared in evidence that *Stephen Adams* a silversmith, on 20th November 1799, sent a box, in which the things mentioned in the indictment were contained, from *London*, directed to *Mr. Thomas Brodrick* at *Spalding* in *Lincolnshire*, by the *Boston Coach* from the *Saracen's Head* on *Snow Hill*, which box was delivered by *Mr. Adams*'s apprentice to *John Booth* the book-keeper at the said inn, who called it over among other things in the way-bill, and delivered it to a porter, who put it into the coach. It was proved by the testimony of an accomplice, that the prisoners, while the coach was going on just beyond *Ponders End*, took from it seven boxes and a brown paper parcel, one of which boxes contained the articles mentioned in the indictment. *Markham* the coachman was at this time driving the coach from *London* to *Royston*, about thirty-eight miles from *Shoreditch Church*; but he never missed the property or knew that any thing had been lost, until his return to *London*. It also appeared to be the invariable practice of the proprietors of this coach never to call on the coachman to make good losses, except when they happened by his neglect, and that for goods stolen privately from the coach they never even expected compensation from the driver.

BUT it having been proved that the christian name of *Mr. Miller*, one of the coachmasters, in whom the property was laid to be in THE FIRST COUNT, was *James Edward Miller* instead of *Richard Miller*, THE FIRST COUNT was, on this variance, abandoned by the Counsel for the prosecution; and THE THIRD COUNT being rejected by the Court on the ground that where it is in the power of a pleader to state a legal proprietor, as in this case, by laying the property to be in the persons from whom and to whom the goods were sent, it was improper to lay the property as belonging to *persons unknown* (1), the case went to the Jury on THE SECOND COUNT, and they found the prisoner guilty.

(1) 1 Hawk. c. 33. s. 29. 2 East, 651. 781. and the Case of Rex v. Walker, 3 Camp. 264.

BUT the case was saved for the consideration of THE JUDGES on a question whether the goods were well laid to be the property of *Thomas Dancer Markham* the coachman.

1800.

DEAKINS'S CASE.

In the May Session following however the prisoners were again indicted for stealing other things which they had taken at the same time, and these were laid in THE FIRST COUNT to be the property of *William Mountain*, *John Wallis*, *Joseph Butt*, *Thomas Henney*, *Eusebius Danby* and *James Edward Miller*; and in THE SECOND COUNT, to be the property of *Francis Welden*. But on this indictment there being no evidence to corroborate that of the accomplice, the prisoners were acquitted, and the question therefore on the former trial revived.

THE case was argued in THE EXCHEQUER CHAMBER by KNAPP, *for the prisoner*, and by BEVIL, *for the Crown*.

KNAPP, *for the prisoner*. Larceny can only be committed of the mere personal goods of another, and therefore in an indictment for that offence the goods stolen must, if the owner be known, be stated to be his property (1). Property can only be *in possession*, which is where a man has not only the right to enjoy, but the actual enjoyment of it, or *in action* which is where a man has only a bare right to, without any occupation or enjoyment of it. To constitute the crime of larceny the property must be taken from the *possession* of the owner. Property in possession is either *absolute* or *qualified*. It is clear that the coachman, in the present case, had not the *absolute property* in the things stolen, and therefore the question is whether he had such a *qualified possession* of them as will warrant the allegation of their being his property. *Sir William Blackstone* says, that in the case of a bailment or delivery of goods to another person for a particular use, as to a carrier to carry to *London*, to an innkeeper to secure in his inn, or the like, both the bailor and the bailee hath a qualified property in the goods so delivered; and that each of them is intitled to an action in case the goods be damaged or taken away; the bailee on account of his *immediate possession*, and the bailor because the possession of the bailee is mediately his possession also; but that a servant who hath *the care* of his master's goods or chattels, as a butler of plate, a shepherd of sheep, and the like, hath not any property or possession either absolute or qualified, but only a mere charge

(1) Long's Case, Cro. Eliz. 490. 2 Hawk. c. 25. s. 71. Dyer, 99.

1800.

DEAKINS'S CASE.

or oversight. *Sir Edward Coke* also in treating on the subject of larceny or theft by the common law, says, "There is a diversity between *a possession* and *a charge*; for when I deliver goods to a man, he hath *the possession* of the goods, and may have an action of trespass or an appeal, if they be taken or stolen out of his possession; but my butler or cook who *in my house* hath the charge of my vessel or plate, hath no possession of them, nor shall have an action of trespass or appeal as *the bailee* shall, and therefore if they steal the plate or vessel it is larceny, and so it is of a shepherd; for these things be in *onere et non in possessione promi, coci, pastoris, &c.*": It will therefore be incumbent on me to shew that the coachman in the present case, had only *a bare charge* of the things stolen by the prisoner, and not such *a possession* of them as will render him in law a *bailee*. To place property *in the possession* of another, he must not only have the right to, but the occupation of it also; but the coachman had no *right to*, or occupation of the property laid in this indictment. In *Rex* v. *Bass* (1), a master delivered goods to his servant to carry to a customer, and the servant, instead of so doing, converted the property to his own use, and the Judges held that he was indictable for larceny in stealing the goods from *the possession of his master*, for that the master had a right, while such goods were *in transitu*, to countermand the delivery. This decision shews that the servant had no possession of the goods so delivered to him, and is, in principle, precisely similar to the present case, for, upon this authority, if the coachman had stolen these goods he might have been indicted for the larceny, which could not be if he had had any *right to a possession of*, or in any way more than the *bare charge* of them (2); "and *Sir Matthew Hale* says that whoever hath *the care* of another's goods hath not *the possession* of them, and *therefore* may, by his felonious embezzling of them, be guilty of felony." The same point was decided in the case of *Rex* v. *Spears* (3), and *Rex* v. *Abrahat* (4), where the prosecutors being corn-factors, had ordered their respective lightermen to fetch certain quantities of corn from on board different ships in the river *Thames*, which corn the masters had previously pur-

3 Inst. 108.

(1) *Ante*, page 251. Case 125.

(2) 3 Hen. 7. fol. 12. pl. 9. 1 Hale, 506.

(3) *Ante*, page 825. Case 307.

(4) *Ante*, page 824. Case 306.

1800.

DEAKIN'S CASE.

chased, and the lightermen, after having received the corn into their masters' lighter, embezzled part of it, and it was held that this delivery to their servants did not give the servants such a *possession* of the property as to prevent them from being indicted for the larceny. *The possession* of goods resides with those who possess the right to the property, as is clearly determined by the case of *Hudson* v. *Hudson* (1); and therefore it is clear that *the possession* of these goods in the present case was in *the coach-masters* and not in *the coachman*. That this delivery conveyed no interest in the goods to the coachman is evident, from considering whether he could have maintained *trover* against any person who had taken them, not feloniously, but without right out of his custody, and had refused to redeliver them: for if the party has neither the actual possession nor the right of possession, this action will not lie, and property in the plaintiff is essentially necessary to maintain *trover*; for, according to the case of *Webb* v. *Fox* (2), the plaintiff must have either the absolute or special property in the goods that are the subject of the action. Trover was brought (3) to recover a sum of money; and the evidence was that the son of the plaintiff had *a general authority* from his father to receive in and pay out his father's monies; that the son took a bill for money that was due to his father, and received the amount of it without any *particular authority* for that purpose; that this receipt was with intent to embezzle and spend it; that he gave a receipt as for money had and received to his father's use; and that this money was paid over by the son to the defendant; and on a question whether the father could maintain trover for this money HOLT, *Chief Justice*, held, that the general authority which the son had to receive and pay his father's monies, made the son's receipt to be the receipt of the father, and the possession of the son the possession of the father, the son being to this purpose his father's servant: so in the present case the receipt of the goods by the coachman, was the receipt of them by his masters, and placed them so completely in their possession, that if they had been taken tortiously instead of feloniously, *trover* to recover them must have been brought in their names. In *Daws* v. *Peck* (4), it is expressly

(1) Latch. 214. and see the case fully cited in Rex v. Wilkins, page 522.

(2) 7 Term Rep. 398.

(3) Anonymous. Salk 289.

(4) 8 Term Rep. 334.

1800.

DEAKINS'S CASE.

said to be more consonant to the general principles of law to refer all transactions of *agents* to *the principal* on whose account they were entered into, than to permit a man to make himself liable to either of two persons on account of the same interest. In 27 *Assize fol.* 38. a guest at an inn took the goods of the landlord, and he was held guilty of larceny, because the goods were in the landlord's *possession*, and the guest had the *bare use* of them; but the coachman in this case had not even *the use* of the property stolen. If the royal palace, or the house of any nobleman in which apartments or lodgings are assigned to the jeweller, treasurer, steward, chamberlain, &c. and any of these apartments are broken open burglariously, the indictment must suppose it to be *domus mansionalis* of the king, or of him who is the lord or proprietor of the house, for the others have *the use of the lodgings as servants only*, and not as owners (1). And this principle has been recognized and acted upon in several subsequent cases (2). The coach-owners themselves were only the *bailees* of this property; and the special possession which resided with them could not be transferred by them to another person, especially to their own servant; for the property had then reached its utmost possible destination, and any further delivery to their servant, though it might change the custody, could not alter the possession. But these goods were not delivered *personally* to the coachman; they were deposited in the boot of the coach with other parcels, from the warehouse, by the porter of the inn, and of which the coachman had no particular information given to him. He is a mere instrument employed by his masters to drive the coach from *London* to *Royston* where his care ended: the guard might as well be said to have had the possession of these goods as the coachman, whose sole engagement was to drive the coach safely through that particular stage. His situation was precisely the same as that of the driver of A MAIL, and in an indictment for robbing the mail, the property is not laid to belong to the coachman, but to the king. The reason given in the case of *Francis Trollop*, why a carrier may indict a thief for stealing goods which he is entrusted to carry, is that

(1) Hungate's Case, 1 Hale, 522, 557.

(2) See East's P. C. page 501.

1800.

DEAKINS'S CASE.

he may maintain an action of trespass against any one that takes them from him; but could the coachman have maintained trespass of these goods, if they had been taken, not feloniously, away? Certainly not; for both *property* and *possession* are necessary to maintain this action.

BEVIL, *for the Crown.* The second count of this indictment is good in law, notwithstanding the conception of the coach-owners that their driver, *Thomas Dancer Markham*, was not liable to them for the loss of such parcels as were delivered into the coach. The law-books do not appear to furnish any case precisely in point with the present; but if I shall be able to shew that the coachman, if he had taken the goods feloniously away, could not have been indicted for the larceny, but that if they had been taken feloniously from him he might have maintained an appeal of larceny against the thief, or, if not feloniously, an action of trover, it will follow that he must be considered to have, in his capacity of driver of the coach, such *a possession* of the property intrusted to his care as will intitle him to allege the goods mentioned in the indictment to be *his property*, as against the taker.

AS TO THE FIRST POINT, it was determined in the *Year-Book*, 3 *Hen. VII. fo.* 12, contrary to the determination in the case of the carrier in the *Year-Books*, 10 *Edw. IV. fo.* 14. and 13 *Edw. IV. fo.* 9. *pl.* 10. that a servant who has the property of his master under his care and keeping cannot be guilty of felony in taking it away, because he having *the care* of it, it cannot be said to be taken *vi et armis* (1); but it was agreed in the *Year-Book*, 21 *Hen. VII. fo.* 14. *pl.* 21. that while the servant is *in the house of his master* or *attending on his person*, that which the master commits to his care is adjudged to be in *the master's possession*; and to settle this difference of opinion, as appears by *Sir B. Shower*'s argument in the case of *Rex* v. *Meeres* (2), the statute 21 Hen. VIII. c. 7. was made, by which it is made felony in a servant to steal his master's property to the amount of forty shillings, contrary to the trust and confidence reposed in him, although such property was delivered to him to keep. And accordingly it was determined in Michaelmas Term, 39 Eliz. that

(1) Kelynge, 81. Rex *v.* Walsh, *post*, O. B. Jan. Sess. 1812.

(2) Show. 51. Co. Pl. Cor. 64. Kel. 44.

1800.

DEAKINS'S CASE.

the servant of a woollen-draper, who had the goods in his master's shop put under his care to sell, was guilty of felony, in converting them to his own use; for that the goods were still in the possession of the master. Anterior, therefore, to the statute 21 Hen. VIII. c. 7. the law considered property so committed to the care of a servant, to be in the master's possession. And this principle was carried so far, that *Sir Matthew Hale* says: "If servants in the house embezzle their masters' goods after his decease, it was not felony at common law, but only trespass; because the goods were *quodam modo* in their custody." This was therefore remedied by the statute 33 Hen. VI. c. 1. But the statute 21 Hen. VIII. c. 7. only extends to *domestic servants*, or those living *intra mœnia*, and not to that description of servant which the coachman in the present case is. The law, therefore, with respect to such servant, is precisely the same now as it was before the statute 21 Hen. VIII. c. 7. was passed, namely, that they have such a possession of the property committed to their care, as makes them guilty of a breach of trust only, and not of felony, by taking it tortiously away; and with this construction the Year-Book of *Edward the Fourth* agrees. For in that case it is said, that although a cook, butler, or other servant of the like description is merely ministerial, and has no possession of the things committed to his care, yet that if goods are *bailed* to a servant, they are in his *actual possession*, and he cannot take them feloniously away (1). This doctrine is still further confirmed by the Case 21, *Hen. VII. fo.* 14. where it is agreed, that if a master deliver a horse to his servant to ride upon to market, or a parcel to a carrier to carry to *London*, or a sum of money to pay to a particular person, or to buy any thing with, it (*a*) is not felony in the servant or bailee to take such things away; and the reason assigned is, because they have, by such delivery, a legal possession of the property, and the master may have a good action of detinue or account against them for such an asportation. In the case also, in *Moore's Reports*, it is said, that if property be delivered by a master to a servant

1 Hale, 515.

See 2 East's Crown Law, 561.

(1) 18 Edw. 4. fo. 9. pl. 10. 4 Reeve's Hist. 179.

(*a*) See Watson's Case, East, 563, and Lavender's Case, *post*.

1800.

DEAKINS'S CASE.

to deliver over, and the servant take it away, it is not felony, because he has such a *special property* as would enable him to maintain *trespass* against any one who should take it out of his possession. These authorities clearly shew that the coachman, in the present case, could not have been indicted for stealing the property that was committed to him to deliver over to the respective consignees; and if he could not, it must be because he has such an ownership in and possession of this property, as will intitle him to indict the thief for taking it feloniously out of his possession. There are indeed two modern decisions which seem to contradict this position. The first is the case of *Rex* v. *Bass* (1), where the porter of a gauze-weaver was sent with a package of goods to deliver to a customer, and he went away with them. The second is the case of *Rex* v. *Lavender* (2), where his master, *John Edmunds*, delivered to his servant, *John Lavender*, the sum of forty guineas in cash, to carry to the house of one *Thomas Flawn*, and there to leave the same with him, he, *Flawn*, having agreed to give *Edmunds* bills for the said money in a few days; but instead of following the directions of his master, he went away with it, purchased a watch and other things with part, and kept the rest in his possession until he was apprehended; and on a reference to the Judges, Whether this was *felony*, or only a *breach of trust?* All the Judges held it was felony; for that the money was specifically given to him to deliver over to *Flawn*, and not as in *Watson's Case* (*a*), to make purchases with. In both these cases, the prisoners were held guilty of felony; but it may be remarked that these cases fall precisely within the distinction that was taken in the case in the *Year-Book*, 21 Hen. VII. *fo.* 14. for the offender in that case appears to have been a servant *living in the house*, and *attending the person of the master*, and of course to have

(1) *Ante*, page 251. Case 125.

(2) 2 East's Crown Law, page 566.

2 East's C. L. 684.

(*a*) One *Cooper*, a surrogate, sent *Watson*, his servant, with the sum of 3*l.* 18*s.* for the express purpose of buying blank licenses with it, instead of which he ran away with the money: and the Judges then held that this was not felony; for that to make it felony, there must be some act fraudulently done by the prisoner to obtain the money. But in Lavender's Case, this point was denied to be law. 2 East, P. C. 563.

been at all times under his immediate controul, which was not the condition of the coachman in the present case, for the proprietors had no controul over him but at the time he was driving the coach. It is also observable that in the case of *Rex* v. *Bass*, the property taken away was different from that with which the offender had been entrusted. The thing delivered to *Bass* was *a truss* of goods, but it was the *contents* of the truss which he was indicted for stealing. But the liability of the driver to be indicted, if he had been guilty of the larceny, will not exclude him from indicting the thief: for I may be permitted to argue that he had the possession of this property for *rightful purposes only*, and that if he would be liable to an indictment as a wrong-doer for taking them tortiously and feloniously away, so as against *a wrong doer*, for taking them feloniously out of his possession, he would have a right to call them *his own property;* as according to *Sir William Blackstone*, either *the bailor* or *the bailee* may have an action against the person who shall wrongfully disturb such a possession: and by the express declaration of *Holt*, C. J. in the case of *Savage* v. *Walker*, 11 *Mod.* 135. a delivery to a servant is a bailment. Suppose, then, the proprietors had taken the goods, *animo furandi*, out of the coach, while *Markham* was driving it; there is no doubt but that they might have been indicted for the larceny in taking the property of the coachman (1), which could not be, unless he had the possession of it: for to support the allegation of larceny, the goods must be taken from the possession of the prosecutor. It may be said, that the proprietors being themselves only bailees of the goods, the coachman is merely the bailee of a bailee; but that a common servant to whom goods are delivered by his master, is the bailee of the absolute owner of the property: but goods so circumstanced are as much under the personal protection of this coachman, as they would have been if the proprietors had been the absolute owners. If A. deliver any thing to B. to keep for him as a friend, and he deliver it to C. for the same purpose, C. is as much the bailee of B. as if he had received the things from A. And in the *Year-Book* 2. *Hen. IV. fo.* 18. *b.* it is decided that if a bailee bail

1 Hale, 513.

(1) 7 Hen. 6. 43. Co. P. C. 110. S. P. C. 26. 1 Hale, 513.

1000. DEAKINS'S CASE.

things to another he may have an action of detinue against the second bailee; and therefore, as such double bailment makes no difference in the case of a common bailee, it can make no difference in the case of a servant who is thus carrying out goods, 1 *Roll. Abr.* 606. And it is said by *Sir Matthew Hale*, " that if A. bail goods to B. to keep for him, and B. be robbed of them, the felon may be indicted for larceny of the goods of A. or B. for it is good either way; for though the property is still in A., B. hath the possession," which is precisely the present case. But the inquiry, Whether the coachman might not, in this case, have maintained an appeal of larceny? will make this matter still more clear; and there is a case in *Fitzherbert's Abridgment*, title *Corone*, *pl.* 100. in which it is expressly said, that a servant may bring an appeal of robbery for goods of his master's in his custody: if so, he certainly may an indictment for the same offence. *Brooke*, also, title *Appeal*, *pl.* 91. in abridging a case in the *Year-Book*, 2 *Edw. IV. fo.* 15. *a pl.* 7. says, that if a servant be robbed of his master's goods, he may have an appeal against the robber, and that the law is similar with respect to a bailee. The case in the Year-Book was trespass against a clergyman for taking and carrying away two loads of barley, in which it appeared that the *Abbot of Westminster*, being intitled to a portion of tithes from the lands in which the trespass was committed, had ordered his servant who was the plaintiff to gather in the said tithes; that the servant had loaded the said tithes in two carts; and that the defendant had driven the said carts away; and on a question whether the servant could maintain the action, LITTLETON, one of the Judges, said, " I clearly understand that if I deliver goods to a man to keep, and they are taken out of his possession, he may have a good *writ of trespass*, and so in the same manner here, for I think there is no difference where I say to my servant, ' Bring me those goods which are in such a place,' and as he is bringing them to me they are taken out of his possession, and where I give goods to one to keep, and they are taken out of his possession. Suppose the plaintiff had been robbed of them, I say that he might have had an

1 Hale, 513.

1800.

DEAKIN'S CASE.

appeal of robbery, he being answerable over: *quod fuit concessum.*" *Sir William Staundforde*, in citing the above case, is of opinion, that the servant is intitled to the appeal, whenever the goods of his master are taken out of his *care* and *possession*, "although," says *Pulton*, in referring to the same case, "he had no property in the things stolen." The law of this case is also confirmed by CREW, DODDERIDGE, and JONES, in the case of *Drope* v. *Thaire*, *Latch.* 127. But in the case of *Heyden* v. *Smith* (1), *Sir Edward Coke* comes much nearer to the facts of the present case, for he says, "a servant who is *commanded to carry goods to such a place* shall have an action of trespass or appeal (2)." The same learned writer, in his Institute (3) also observes, in explaining the diversity between *a possession* and *a charge*, that although a butler or cook, who *in the master's house* has charge of his vessels or plate, has not such a possession of them as will intitle him to an action or an appeal, as *the bailee* shall have; yet that "where goods are *delivered* to a man, he has *such possession* of them as will enable him to support an action of trespass or an appeal. On this distinction, it may perhaps be contended, that the coachman had only the *bare charge*, and not *the possession* of the goods; but the case of the servant of the *Abbot of Westminster* shews clearly, that goods delivered to a servant, *out of the house*, to the use of his master, places him in a situation very different from that of a butler or a cook, to whom the property of the master is confided for domestic purposes. This distinction is supported by the opinion of *Mr. Serjeant Hawkins*, who expressly says, that "there is no necessity that the appellant have the *absolute property* of the goods stolen; for it seems agreed that a carrier, or even a servant, to whom goods are delivered to be carried to a certain place, may have an appeal of larceny against any one who shall steal them, for that they have a special kind of property in them against all strangers; but that no one can maintain such an appeal who has the *bare charge* of goods, without the possession, as a butler or cook, who in the master's house have the charge of his goods, for that, in such a case, the whole possession, as well as the absolute property,

Bk. 2. c. 9. p. 606.

Pult. de pace et Regis, 152. Sect. 22.

(1) 13 Co. 69.

(2) See also 4 Bac. Abr. 583. 1 Com. Ab. 517. 2 Viner, 536.

(3) 3 Inst. 108.

2 Hawk. c. 23. s. 44.

1800.

DRAKINS'S CASE.

in judgment of law always continues in the master." The prosecutor in the present case is neither a butler nor a cook, nor any other description of servant who has the care of his master's goods *within his house*, but he is a servant to whom his master has delivered goods to be carried to a certain place, and therefore on this distinction he has *the possession* of such goods, and not the *bare charge* only; and consequently might have maintained an appeal against the prisoners, and have alleged that the goods taken were his goods (1). Whatever the conception of the proprietors may have been, it is certain that if these goods had been lost by the *gross negligence* of the coachman, he would in law have been answerable over to them for the value. And this will introduce THE THIRD HEAD of inquiry, Whether, if they had been so lost, he might not have maintained *trover* for them against the finder, or against any other person who should have converted them to his own use; for if he had a sufficient possession of these goods to enable him to maintain this action, he had certainly such a right to them as will enable him to describe them as his *property* in an indictment. The custody he had of them was such as gave him a right to hold them against all the world, except the right owners, and he had certainly a much clearer title to them by the delivery from the proprietors, than if they had been lost, and he had accidentally found them; but it has been decided in the case of *Armorie* v. *Delamain*, that where a chimney-sweeper's boy found a jewel and carried it to the shop of the defendant, a goldsmith, to inquire the value of it, and the defendant detained it and refused to deliver it back again, the boy might recover it in this action; for although the finding did not give him an absolute property or ownership therein, yet it gave him such a property as would enable him, as rightful proprietor of it against all except the right owner, to maintain this action (2). Another analogy is that which arises on the statute of Hue and Cry, for it is determined in a variety of cases (3), that if a servant be robbed of goods belonging to his master, the servant or the master may maintain the action, and if the servant may sue the hundred,

(1) Per HOLT, C.J. in Knight v. Cole, 1 Show. 154.

Stra. 505.

(2) Bull, N.P. 33. See also Mr. Justice Lawrence's judgment in the case of Webb v. Fox, 7 Term Rep. 398.

(3) 2 Salk. 616. Brownl. 155. Poph. 178. Latch. 127.

1800.

DRAKINS'S CASE.

surely he may indict the thief. The statute, indeed, gives this action to *the party robbed*, and therefore it may be contended that the reason why, in this case, the servant may bring the action, is because he is the actual party robbed; but if, for the purpose of obtaining a civil satisfaction, he is considered as the *party robbed*, it would be strange to say, that where the public are concerned he shall not; and as he may sue the hundred, so upon a similar policy he may indict the thief. It is true that, in the case of *Rex* v. *Wilkins* (1), it was determined that where a tradesman delivered a parcel of goods to his servant to carry to a customer, and the prisoner contrived to meet the servant on his way, and on pretence that he was going by the desire of the customer to the master's shop, to fetch this parcel in lieu of another, obtained the delivery of it by exchanging it for a parcel of old rags of no value, which he had purposely with him, the property was taken feloniously from the possession of the master; but it does not follow that because the master might indict the thief, that therefore the servant could not, for he certainly had possession of this parcel as against all the world except the right owner, and might therefore have called a wrong-doer to account for violating such possession. Besides, it must be recollected that the servant in this case was a menial servant, which brings the question of *possession* within the distinction already mentioned.

(1) *Ante*, page 520. Case 286.

Mr. Baron Hotham, in February Session 1801, delivered the opinion of the Twelve Judges to the following effect:—Upon the trial of this indictment in April Session 1800, a doubt arose whether the goods stolen could legally be considered the property of *Thomas Dancer Markham*, who was not the owner of the goods, but merely the driver of the *Boston* coach, in which they had been deposited for the purpose of being carried to *Royston*; and a very great majority of the Judges are of opinion that the property was well laid to be in the driver. The material question was, Whether the driver had *the possession* of the goods or the *bare charge* of them only; but in these cases the driver must, in contemplation of law, be considered to have not *the charge* only but

1800.

DEAKIN'S CASE.

the possession also, and therefore this case is not open to that distinction: for although as against his employers the masters of the coach, he, as mere driver, can only have *the bare charge* of the property committed to him, and not the legal *possession* of it, which remains in the coach-masters, yet as against all the rest of the world he must be considered to have such *a special property* therein as will support a count charging them as his goods, for he has in fact the possession of and controul over them; they are entrusted to his custody and disposal during the journey; and the inconvenience would be great indeed if the law were otherwise: the difficulties and mistakes which must unavoidably arise in hunting after all the persons who may be concerned as proprietors of a stage-coach, for the purpose of prosecuting an indictment of this nature, would be endless and insurmountable. The law therefore on an indictment against the driver of a stage-coach, on the prosecution of the proprietors, considers the driver to have *the bare charge* of the goods belonging to the coach, but on a charge against any other person for taking them tortiously and feloniously out of the driver's custody, *he* must be considered as *the possessor*. The Judges therefore are of opinion that the second count of the present indictment is right, and that the prisoners have been legally convicted.

CASE CCCXVII.

THE KING *against* JOHN DAVIES, *alias* SILK.

If the owner of a house has no intention of residing in it himself, it cannot be considered his dwelling-house, although his servant sleeps in it every night, if his sleeping there be merely to protect the furniture. S. C. 2 East's C. L. 499.

AT the Old Bailey in June Session 1800, *John Davies* was indicted before MR. BARON CHAMBRE, present MR. JUSTICE GROSE and THE RECORDER, for stealing a quantity of pans, kettles, candlesticks, &c. above the value of 40*s*. the property of *Thomas Pearce*, in his *dwelling-house*.

THE larceny was clearly proved, but it appeared that *Mr. Pearce* was a brewer in considerable business living in *Milbank-street*, and owner of *the Star and Garter* public-house in *Palace-yard*, in which house the larceny was committed. The house was at this time shut up, and in the day-time totally uninhabited; but *Mr. Pearce's* man was put to sleep in

1800

DAVIES'S CASE.

it at night for the protection of the goods that were in the house, until some other publican should take possession of it. It had remained in this state about six weeks previous to the robbery, during which time it had been let to a publican who had not taken possession of it. There were at this time in the house sixteen or seventeen beds, and a variety of chairs, tables, and other articles of furniture, which *Mr. Pearce* had purchased of the former tenant, with a view to accommodate the person to whom he might let it, but with no intention of residing in the house himself, either personally or by means of any of his servants.

THE COUNSEL *for the prisoner* submitted to the Court, that this house could not be considered as the dwelling-house of *Pearce*, and that therefore the prisoner ought to be acquitted of the capital part of the offence, and cited the cases stated in the margin. The case however was left with the Jury, and they found the prisoner guilty of the whole charge, but the point was saved for the consideration of the Judges.

See Harris's Case, O. B. October 1795. *Ante*, page 701. Case 288. Thompson's Case, Kingston, 1796. *Ante*, page 771. Case 296. Fuller's Case, O. B. Dec. 1782. *Ante*, page 186, *notis*.

THE JUDGES, in Trinity Term 1800, were of opinion that as it clearly appeared by the evidence that *Mr. Pearce* had no intention whatever to reside in this house either by himself or his servants, it could not in contemplation of law be considered as his dwelling-house; and that not being such a dwelling-house wherein burglary might be committed, the capital part of the charge under 12 Ann. c. 7. was done away. The prisoner accordingly received his Majesty's pardon on condition of transportation.

THE KING *against* GEORGE THOMAS.

CASE CCCXVIII.

If a person employed by the executors of *a public accountant*, to settle the account of the testator with Government, procure fabricated vouchers, and deliver them to the Navy Board in order to exonerate the estates of the testator from an extent, it is a forging and uttering within the 2 Geo. II. c. 25.—S. C. 2 East, 934.

AT the Old Bailey in September Session 1800, *George Thomas* was tried before MR. JUSTICE LE BLANC, present MR. JUSTICE CHAMBRE.

THE indictment consisted of three Counts. The first

1800.

THOMAS'S CASE.

count stated, that *George Thomas*, on the 20th March, at the parish of *St. Clement Danes*, feloniously did utter and publish as true a certain false, forged, and counterfeited *acquittance and receipt for money* in the words, letters and figures following.

"Received the 7th November 1798 of *John Collinridge* "the sum of one pound fourteen shillings for iron "pales: For the use of Mr. Shortland.

"£1 14 0. "G. D. ARVILLE."

And then it proceeded to charge him with uttering *at the same time* a great number of other receipts of different sums, dates, and signatures, purporting to be for monies received from *John Collinridge*, for work, labour, and materials done and furnished for his Majesty's navy, (all of which were set out) with intent to defraud THE KING, he well knowing, &c.

The Second Count was for knowingly uttering another acquittance and receipt, *viz.*

"Received 8 May 1794 of *John Collinridge* the sum of "three pounds twelve shillings for wheelwright's "work for the Honourable Commissioners of his Ma- "jesty's Navy.

"£3 12 0. "WILLIAM CLARKE."

THE Third Count was for forging the said receipt with intent, &c.

THE prisoner, who had been admitted to bail, now surrendered himself, and was put upon his trial; but after the indictment had been opened, and before any witnesses were examined,

Mr. Garrow, Serj. Williams, Mr. Manley, Mr. Knowlys.

THE COUNSEL *for the prisoner* submitted to the consideration of the Court, whether the prosecutor ought not, under the circumstances of this case, to elect on which of the several receipts stated in the first count of the indictment he intended to proceed, and be restrained from proceeding on more than one of them; as amidst such a variety it would otherwise be almost impossible for the prisoner to conduct his defence.

vide ante, page 808.

MR. JUSTICE LE BLANC however referred to the indictment, by which it appeared that all the receipts stated in the first count were charged to have been *uttered at one and the same time;* and as this single act of uttering would, if clearly proved, constitute only one offence of *uttering* the receipts, he refused the application.

MR. CHARLES BICKNEL, Solicitor to the Navy Board, was accordingly called, and he proved that the prisoner brought and delivered to him these receipts in a book together with a bundle of papers, saying that they were *Collinridge's* accounts and vouchers, which they were, and that he delivered them the next day to Mr. *Hartinwell* the chief clerk in the Accountant's Office of the Navy Board.

THE EVIDENCE.—The prisoner *George Thomas* was an attorney in extensive business and of high character, living in Northamptonshire, where a person of the name of *John Collinridge* also resided. *Collinridge* had been employed for some years by the Navy Board on account of Government, and, in the course of that employment, various sums of money had been occasionally impressed into his hands on account of the several services he had to perform in the character of Purveyor and Converter of Wood in Salsea and Whittlewood Forests, and for the disbursements of which monies he was to produce vouchers, on the settlement of his accounts with the Board, as *a public accountant.* On his death however in the year 1798, it was discovered that he had left long and intricate accounts with government in a very disordered and unsettled state, and which his executors *Richard* and *John Yeates* were quite unable to settle and make out. It appeared by the books of the Navy Office that the deceased had received at various times sums of money amounting in the whole to 11,535*l.* of the disbursement or expenditure, of which no account or vouchers whatever had been furnished: an EXTENT of course was issued on the part of Government to seize and sequester his estates both real and personal until a settlement should be made by the executors, who were at the same time called upon to furnish the required account,

1800.

THOMAS'S CASE.

together with vouchers for all the items the account should contain, in the best manner they were able. The executors, alarmed at the involved state of the testator's accounts, and not knowing how to extricate themselves from the difficulties in which they were placed, applied to Mr. *Thomas* to assist them in adjusting the testator's affairs; particularly to furnish the required accounts and vouchers to the Navy Board, and to procure a settlement of them with the Commissioners. The prisoner, on the 20th May 1798, by a letter addressed to Mr. *Slade*, acquainted the Commissioners with the embarrassed state of *Collinridge*'s affairs, and the many difficulties under which, in making up his accounts and procuring the proper vouchers, he laboured; but he was told that he must do it in the best manner he was able, and that unless proper vouchers were produced for every item, the charges would certainly not be allowed. Soon after this information he transmitted a letter to the Navy Board, signifying that he had fortunately found among the papers of the deceased, a rough account made up to the month of May 1797; and not long afterwards he delivered the present account to the time of the testator's death, to Mr. *Bicknel*, with a bundle of papers purporting to be the vouchers for the said account, and by which a balance of 1250*l.* appeared in favour of *Collinridge*'s estate. On inspection, however, strong suspicion arose that neither the account nor the vouchers were correct; and after some time they were conveyed by the Navy Board to Mr. *George Boddy*, who had succeeded *Collinridge* as purveyor of the forests, to be closely scrutinized and examined, when it was discovered that the several receipts stated in the indictment, as well as several other vouchers, were forged. Mr. *Boddy*, not suspecting that the prisoner had any thing to do with it, candidly communicated to him the discovery he had made, and pointed out to him the forgeries to which he alluded. The prisoner, on this information, became greatly agitated, and offered to give up all claim to the balance of 1250*l.* upon condition that the estate should be liberated from the extent; but the Navy Board, to whom the proposal was communicated, immediately rejected it. The prisoner then made a

second offer to relinquish the whole of the estate, but that also was rejected, and in the month of October 1799, the prisoner was apprehended, and taken to the Public Office, in Bow-street, where, after a long examination, he was admitted to bail. In the course of the ensuing month he sent a memorial to the Lords of the Admiralty, in which he confessed that he had procured two persons of the names of *William Onan* and *John Adams* to attest some of the receipts which he had found, he said, among *Collinridge*'s papers; but it was clearly proved that the receipts signed by *Onan's mark* had been written by the prisoner's amanuensis; that *Onan* was not only well able to write his name, but that he was absent from England at the time the receipt bore date; that the receipt for 3*l.* 12*s.* purporting to be signed "*William Clark*," was partly written by one *Robins*, partly by *the prisoner*, subsequent to *Collinridge*'s death, and that it was not signed by *William Clark*; that the several receipts which purported to be signed by *Saunders*, also bore date at a time when he was out of the kingdom; and that *Treadwell*, whose name purported to be signed to a receipt dated 5th October 1793, purporting to have "received of *John Collinridge* 6*l.* 18*s.* 6*d.* for blacksmith's work for the service of his Majesty's navy," was a fabrication of the same kind.

THE Jury found the prisoner guilty of the whole charge.

BUT THE COUNSEL *for the prisoner* submitted to the Court that this case did not, under the peculiar circumstances of it, amount to an offence within the 2 Geo. II. c. 25. The receipts they said purported to be receipts given to *John Collinridge* by the several persons employed by him, for money therein stated to have been paid by him to them for work and materials done and provided for the business in which he was employed under the Navy Board; that these receipts had been produced by the prisoner as vouchers to accompany and verify *Collinridge*'s accounts, in order to get them passed by the Navy Board; which account the prisoner had taken upon himself, after *Collinridge*'s death, to get passed, in order to liberate the deceased's estate and effects from an extent which had issued by Government against them; that the workmen had been solely employed by *Collinridge*, and not by the

1800.

THOMAS'S CASE.

Navy Board; that *Collinridge* therefore was the only person who was responsible to the persons he employed; and that the Navy Board had no concern with the truth or the falsehood of these receipts, it being perfectly indifferent to that Board whether the several sums of money for which these receipts purport to have been given to *Collinridge* were in fact given by those persons respectively or not.

MR. JUSTICE GROSE, in December Session 1800, delivered the opinion of the JUDGES. The prisoner was tried in September Session on an indictment charging him in the FIRST COUNT, with having, on such a day, knowingly uttered and published as true, *twenty-two* false, forged and counterfeited acquittances and receipts for money; setting them out severally as purporting to be signed by different persons as and for monies received by *John Collinridge*. There were two other counts, one for forging, the other for uttering one of the said receipts. Previous to the trial it was submitted to THE COURT by the prisoner's Counsel, that the prosecutor ought to be directed to point out on which particular receipt, among the number of receipts stated in the first count, he intended to proceed, and be restrained from proceeding on any other, in order to prevent the defendant from answering so many distinct offences at one time; but as the indictment charged him with having uttered all the receipts at one and the same time this objection was over-ruled. And all the Judges are of opinion that this application was properly refused; for it was proved, by very clear and satisfactory evidence, that the prisoner had uttered all the receipts at one and the same time, by delivering them to the Solicitor for the Navy Board, as vouchers, to verify the accounts of *Collinridge*, a public accountant, who was then deceased; and which accounts the prisoner had undertaken to settle and get passed at the Navy Board. THE SECOND OBJECTION was, that as these receipts purported to be receipts given to *Collinridge* by the workmen whom he, *Collinridge*, had employed, for work and labour done and materials found *for him*, the Navy Board had no concern with them, and therefore that the uttering and publishing them to the Navy Board was not within the statutes of 2 Geo. II. c. 25. s. 1. or the 31 Geo. II. c. 22. for that these workmen were

1800.

THOMAS'S CASE.

solely employed by *Collinridge*, and not by the Navy Board, and that as he, and not the Navy Board, were answerable to them, it was indifferent to the Board whether these sums had been paid or not. But the facts in the case prove that these receipts were forged; and that they purported to have been given to *Collinridge* by workmen for monies paid by him to them for work done *for the Commissioners of the Navy Board.* The persons therefore employed for that purpose by *him* were employed not solely on his account, but on account of the King; and these receipts, if genuine, would have been legal vouchers for his account, and would have intitled him to a discharge from the Navy Board. It is clear then from the facts proved at the trial, and from the verdict of the Jury, that these receipts are forged receipts, and that they were knowingly uttered by the prisoner with intent to defraud the King. The Judges are therefore of opinion that these are receipts for money within the statutes above-mentioned, and that the conviction is right.

THE KING *against* JAMES MACKINTOSH.

CASE CCCXIX.

AT the Old Bailey in September Session 1800, *James Mackintosh* was indicted on 7 Geo. II. c. 22. before MR. JUSTICE LE BLANC, present MR. BARON HOTHAM, and MR. JUSTICE CHAMBRE, for feloniously forging and uttering on 30 July, a certain *order for the payment of money* to the tenor following,

SIR, PETERSFIELD, *August* 6th, 1799.

PLEASE to pay on demand to *Mr. Hugh Young* or order, all my proportion of prize-money, due to me for my services on board his Majesty's ship *Leander*; for which this shall be your authority.

Witness my hand. JOHN (His Mark) JOHNSON.

To *Alexander Davison, Esq.*
No. 21, *Mill-bank, Westminster, London.*

Signed before us,
Walter Noble, Minister.
John Williams, *Francis Gibbons*, } Churchwardens.

An order made by a seaman on his agent "*to pay all his proportion of prize-money*, &c." is an order for payment of money, the forging of which is felony, though drawn under circumstances which, if genuine, would have made it *void* under the 32 Geo. III. c. 34. s. 2.

2 East, 942.

1800.

MACKINTOSH'S CASE.

with intention to defraud 1st *John Johnson*, and 2dly *Alexander Davison*: there were other counts alleging it to be *a bill of exchange*, instead of an *order for payment of money*.

Alexander Davison, Esq. was a prize agent residing in *Millbank-street, Westminster*, and *John Johnson* a quarter-master rated as a midshipman on board *the Leander* at the battle of *the Nile*, from which ship he was discharged as an invalid in the month of *October* 1799. On the 30th *July* 1800, the prisoner at the bar presented the instrument stated in the indictment at *Mr. Davison*'s office, and received for payment of the prize-money therein mentioned, a draft on *Vere, Lucadou and Co.* in *Lombard-street* for £14. 10*s*. 6*d*. The bill was indorsed "Pay to *J. Mackintosh* or order, *H. Young*," to which the prisoner, on receiving the draft, added "Received. *James Mackintosh*." He also produced a letter dated *Market-street, Petersfield*, 24th *August* 1799, purporting to be signed by *John Johnson*, the pretended signer of the bill, and directed to *Mr. Young* the pretended payee, inclosing the bill, the whole of which, together with the certificate of the minister and churchwardens, was proved to be in the hand-writing of the prisoner, and that no person of such names had even ever lived at *Petersfield*. It appeared that *Petersfield* is 18 miles from *Portsmouth*; that a *Mr. Alexander*, a navy agent, resided there, to whom *John Johnson*, of the *Leander*, had given his power of attorney to receive the prize-money due to him for his service on board that ship. It also appeared that *John Johnson*, of the *Leander* (*a*), was not on the 6th *August* 1799, (the date of the bill) discharged from his Majesty's service, but was on board the *Europa*, on his passage home from *Minorca*, and that he did not arrive at *Portsmouth* until 1st *October* 1799, when he was invalided, and discharged by *Lord Nelson*, and that he had since resided in *Scotland*. The fact however was, as it appeared by a certificate sent from the Sick and Hurt Office to the learned Judge after the trial, that *John Johnson* was received on shore at *Haslar*, from *the Leander*,

(*a*) John Johnson, whose name had been forged, was examined as a witness, he having been paid all his prize-money by the agent.

on the 3d *August* 1799, and discharged out of the service on the 5th *August* 1799.

THE Jury found the prisoner guilty.

KNAPP and ALLEY, *for the prisoner*, submitted two questions to the Court. FIRST, that the instrument stated in the indictment was neither *an order for payment of money*, nor a *bill of exchange*, within the meaning of the statute 7 Geo. II. c. 22. for that no sum of money was mentioned in it, and that it was not certain that any money was or would be due to *Johnson* thereon.

SECONDLY, that if it had been a genuine instrument, it would have been void and of no effect, inasmuch as it did not appear to have been drawn pursuant to the direction of the statute 32 Geo. III. c. 34. s. 2. by which it is provided "That no power of attorney or *order* made, or executed by any petty officer, seaman, non-commissioned officer of marines, or marine, who shall have been *discharged* from the service of his Majesty, and who shall be at or *within the distance of seven miles*, from any of the ports where seamen's wages are paid for such service, at the time of making such letter of attorney, shall be good and valid, and sufficient for receiving the whole, or any part of the wages, *prize-money*, or other allowance of money due or to grow due to such petty officers, seamen, non-commissioned officer of marines, or marine, for such service, UNLESS such letter of attorney or such *order*, shall be signed before and attested by a clerk of the treasurer of the navy at such port, or by the inspector of seamen's wills and powers of attorney."

THE case, however, was saved for the consideration of the Judges, Whether this instrument was a *bill of exchange*, or an *order for payment of money*; and whether as *John Johnson* was discharged from the service before, and was in fact, at the time it bore date, within seven miles of a port where seamen's wages are paid, the instrument itself purporting to bear date at a more distant place, was such an instrument within 32 Geo. III. c. 34. as to make the forging of it felony,

1800.

MACKINTOSH'S CASE.

though it did not purport to be signed and attested as that Act requires.

Mr. Baron Hotham, in February Session 1801, delivered the opinion of the Judges to the following effect. The Counsel for the prisoner raised two objections in this case. The first was, that the draft stated in the indictment, was neither an *order for the payment of money*, nor *a bill of exchange* within the meaning of the statute 7 Geo. II. c. 2. The second was, that this instrument did not come within the meaning of the statute 32 Geo. III. c. 34. s. 2. In order to give due consideration to these objections, eleven of THE TWELVE JUDGES have met and deliberated upon them, and they are of opinion, on the first point, that this instrument is in law what the language of the indictment describes it to be, an *order for the payment of money*, and therefore may become the subject of forgery within the statute 7 Geo. II. c. 2 (*a*). On the second point also, namely, whether on the second count, the facts proved amount in law to the crime of forgery, the Judges are of opinion that they do. The order purports to be made by *John Johnson* of *Petersfield*, which place is *beyond the distance of seven miles*, within which distance unless such order is signed before and attested by the proper persons mentioned in the Act, it is not good, valid and sufficient. This attestation the Legislature thought necessary for the security of those who are entrusted with the payment of money, and who cannot be expected to know the fact themselves, but who must rely on the fidelity of the attestation, and upon its being fairly obtained. Now this order purports to have been made

(*a*) A cheque on a banker, though known in the commercial world by the name of *a cheque* only, may, under this statute, be laid as an *order for payment of money*. Lockett's Case, *ante*, page 94. Case 53. Shepherd's Case, *ante*, page 226. Case 113. Willoughby's Case, *ante*, page 226, *notis*; and in the case of George Graham, before BLACKSTONE J. at the Old Bailey, October 1778, the order of a Justice of the Peace upon the high constable of the division or the treasurer of the county, to pay a reward for the apprehension of a vagrant under the 17 Geo. II. c. 5. s. 5. was held to be an order for the payment of money within the words of the 7 Geo. II. c. 2.

1800.

MACKINTOSH'S CASE.

by the party claiming the money at *Petersfield*, which is beyond the distance within which the attestation is required, when in truth and in fact it was not drawn at *Petersfield*, but was an untrue representation, and the money was obtained under such false suggestion; it appearing on the evidence to be false. The Judges therefore are clearly of opinion that this is such a false making of an order for the payment of money as amounts to the crime of forgery; and that the conviction is legal notwithstanding the objections which have been made.

THE KING *against* BENJAMIN POOLEY.

CASE CCCXX.

THE FIRST CASE.

AT the Old Bailey in September Session 1800, *Benjamin Pooley* was tried before MR. JUSTICE CHAMBRE.

THE indictment charged "That *Benjamin Pooley*, late of *London*, labourer, at the time of committing the several felonies and offences hereinafter mentioned, was a person employed in certain business relating to the Post-Office, that is to say, in sorting letters and packets brought and conveyed by the post, to the General Post-Office situate in *London* aforesaid, to wit, at *London* in the parish of *St. Mary Woolnoth* in the ward of *Langbourn*; and that on the sixth day of June in the fortieth year, &c. at &c. a certain letter then lately brought and conveyed by the post, to wit, by the post from *Maidstone*, in the county of *Kent*, to the said General Post-Office, for and to be delivered to a certain person at *Mile End* near *London*, that is to say, one *Archibald Thompson*, and then containing therein a certain draft for the payment of money bearing date at *London*, the seventh day of *May* in the year of our Lord 1800, signed and subscribed by one *David Thompson*, and directed to certain persons using, in trade and commerce, the style and firm of *Messrs. Edwards, Templar, Middleton, Johnston* and *Wedgwood*, whereby the said last-mentioned persons were required to pay to *Mr. Archibald Thompson* or bearer, two hundred pounds; and also a certain other draft for the payment of money, to wit, of the

A draft purporting to be drawn in *London*, but actually drawn at *Maidstone* without any *stamp* on it, contrary to the 31 Geo. III. c. 25. s. 4. is not such a *draft for the payment of money*, as will make a servant of the Post-Office, who steals it out of a letter entrusted to his care, liable to the punishment inflicted on servants of the Post-Office, by 7 Geo. 3. c. 50. s. 1. 3 Bos. & Pull. 311.

1800.

POOLEY'S CASE.

sum of two hundred pounds; came to the hands and possession of the said *Benjamin Pooley*, then and there being such person so employed as aforesaid in the business of his said employment: AND THE JURORS aforesaid upon their oath aforesaid, do further present that the said *Benjamin Pooley* afterwards, to wit, on the sixth of June, in the fortieth year, &c. with force and arms, that is to say, at, &c. being then and there such person so employed as aforesaid, and then and there having the said letter containing the said draft, in the hands and possession of him the said *Benjamin Pooley*, as such person so employed as aforesaid *feloniously did secrete the letter containing the said draft*, (the said draft then and there, *being in force*, and being the property of the said *David Thompson*, and the sum of money made payable and secured thereby respectively, then and there being *unsatisfied*) against the form of the statute in such case made and provided, and against the peace of our said Lord the King, his crown and dignity." THE SECOND COUNT was the same as the first, only calling it *a certain packet* instead of *a letter*; and THE THIRD and FOURTH COUNTS only varied from the first and second, by laying the draft to be the property of *Archibald Thompson*, instead of *David Thompson*; but THE FOUR remaining counts charged the prisoner with having *feloniously stolen and taken the said draft out of the said letter*, calling it respectively *a packet*, and laying it to be the property of, 1st, *David Thompson*, and 2nd, *Archibald Thompson*.

See Rex v. B. Walsh, *post*.

THE INDICTMENT was framed on the statute 7 Geo. III. c. 50. s. 1. which, after reciting, "That it is of the utmost importance to the trade and commerce of these kingdoms, that all letters, packets, bank-notes, bills of exchange, and other things may be sent and conveyed by the post with the greatest safety and security, ENACTS, "That if any deputy, clerk, agent, letter-carrier, post-boy, or rider, or any other officer or person whatsoever employed in receiving, stamping, sorting, charging, carrying, conveying, or delivering letters or packets, or in any other business relating to the post-office, shall secrete, embezzle, or destroy any letter or letters, packet or packets, bag or mail of letters, which he, she or they shall

1800.

POOLEY'S CASE.

and may be respectively intrusted with, or which shall have come to his, her or their hands or possession, containing any Bank-note, Bank post bill, *bill of exchange*, exchequer bill, South Sea or East India bond, dividend warrant of the Bank, South Sea, East India, or any other company, society or corporation, navy, or victualling, or transport bill, ordnance debenture, seaman's ticket, state lottery ticket, or certificate, Bank receipt for payment on any loan, note of assignment of stock in the funds, letter of attorney for receiving annuities or dividends, or for selling stock in the fund or belonging to any company, society, or corporation, American provincial bill of credit, goldsmith or banker's letter of credit or note, for or relating to the payment of money or other bond or warrant, *draft*, bill or promissory note whatsoever for *the payment of money*; or shall *steal* and take out of any packet or letter that shall come to his, her, or their hands or possession, any such Bank-note, &c. (as before mentioned) every such offender or offenders shall be deemed guilty of felony, without benefit of clergy."

THE EVIDENCE.—The prosecutor, *David Thompson*, of *Teston*, near *Maidstone* in *Kent*, having occasion, on Thursday the 5th June 1800, to remit 200*l.* to his brother *Archibald Thompson*, a nursery-man, in *Mile End Road*, near *Whitechapel*, drew, on that day, a draft in the following words:

No. 5. LONDON and MIDDLESEX Bank.
Messrs. Edwards, Templar, Middleton, Johnson and *Wedgwood*, *Stratford Place, London*, 7th May, 1800.

PAY to *Mr. Archibald Thompson*, or bearer, Two Hundred Pounds for

£200. D. THOMPSON.

and inclosed it in a letter directed to his brother, informing him that he had sent him *a cheque* dated the 7th; and that he should have sent it sooner, but that he waited for an opportunity of delivering it himself into the post-master's hands. This letter, with the draft inclosed, he accordingly delivered on the said 5th June into the hands of *Mr. Poole*

1800.

POOLEY'S CASE.

the post-master of *Maidstone*, who forwarded it with the other letters the same evening to *London*, and it arrived in the *Maidstone* bag at the General Post-Office on the ensuing morning, where it was delivered to the prisoner, who was a charge taker and sorter, in the Chief Penny Post-Office, in *Lombard-street*, and also a penny post letter-carrier for the *Limehouse Walk*, which includes *Mile End Road*. The letter never reached *Mr. Archibald Thompson*'s hands; but on Saturday 7th June the draft was presented to the bankers by a person of the name of *Charles Hill*, who said his name was *Thompson*, and paid by them in three Bank-notes of 100*l.* 50*l.* and 40*l.* and 10*l.* in cash, which Bank-notes were the same day exchanged at the Bank of *England* for 20 Bank-notes of 5*l.* each, and 45 of 2*l.* each, the numbers of which being procured, it was discovered that the prisoner had, with one of them, purchased an article of wearing apparel on the 9th June, at a clothes shop in *Houndsditch*, and which article he was wearing on his person at the time he was apprehended: and it was proved that the prisoner had given the draft to *Charles Hill*; and that he had received the money for it of the bankers on the prisoner's account: the draft on being produced in evidence appeared to be without any stamp.

KNOWLYS and KNAPP, *for the prisoner*, thereupon submitted to the Court—

FIRST, That a draft on a banker, or bill of exchange not stamped pursuant to the direction of the statutes 31 Geo. III. c. 25. and 37 Geo. III. c. 136. cannot be received in evidence for any purpose; but that if, on the authority of decided cases, it should be thought admissible, then,

SECONDLY, That such a draft or bill of exchange if it could be so called, cannot be the subject of larceny, inasmuch as it cannot be of any value whatever;

THIRDLY, That being so invalid it cannot be considered *a security* for the payment of money within the statute 2 Geo. II. c. 25. s. 3 *the secreting* of which, when sent in a letter, is within the meaning of the 7 Geo. III. c. 50.

THE COURT, however, received the note in evidence, and

1800.

POOLEY'S CASE.

the Jury found the prisoner guilty. But this case being thought somewhat different from the cases before decided on this subject, it was reserved, upon the above objections, for the consideration of THE TWELVE JUDGES.

IT was appointed to be argued in the Exchequer Chamber before THE TWELVE JUDGES, on Wednesday, 15th November 1800, by Mr. ABBOTT *for the Crown*, and he was heard accordingly (1); but the prisoner not having employed Counsel, the Judges adjourned the hearing until Wednesday, 22d November, and assigned MR. KNOWLYS to argue the case on the part of the prisoner.

(1) See his argument, *post*, page 896.

KNOWLYS, *for the prisoner*, then contended that this paper writing, purporting to be a draft for payment of money, was not, in law, a draft for payment of money within the statute 7 Geo. III. c. 50. on which the indictment is founded, inasmuch as it was not stamped pursuant to the Stamp Acts 31 Geo. III. c. 25. and 37 Geo. III. c. 136.; that being unstamped it was not such a *chose in action*, the stealing of which could be the subject of larceny within the statute 2 Geo. II. c. 25. s. 3. inasmuch as without such stamp it was of no value; and, SECONDLY, supposing it receivable in evidence on the authority of the cases of *Rex* v. *Hawkswood* (2), and *Rex* v. *Colin Reculist* (3), it did not prove the allegation in the indictment, that the draft was then *in force*, and the money made payable and secured thereby, unsatisfied, inasmuch as an unstampt draft cannot have any legal force, or be any security for money, the Stamp Acts having declared that no such draft "shall be pleaded or given in evidence, or admitted in any Court to be good or available in law or equity." The statute 7 Geo. III. c. 50. makes it a capital offence for any person, in the situation of the prisoner, either to *secrete* a letter containing *a draft for the payment of money*, or *to steal* such draft out of any letter in which it may be contained. The first four counts of the indictment are framed upon the first section of the statute for *secreting the letter*, and the four last on the second branch for *stealing the draft*, but the

(2) *Ante*, page 257. Case 129.

(3) *Ante*, page 703. Case 290.

1800.

POOLEY'S CASE.

question will be the same on both the charges; for unless it be such a draft as the Legislature intended to protect, neither secreting the letter containing it, nor stealing it from the letter in which it was contained, will be any offence. The statute either creates a new felony, or takes away the benefit of clergy from an old offence; but in either case the instrument secreted or stolen must be of some value. The preamble obviously imports that the intention of the Legislature was to protect valuable property conveyed by the post against the plunder of the servants of the Post-Office, and against the more open depredations on the mail, for it speaks of "bank-notes, bills of exchange, and other things," which must mean other things of value, because things not of value could not be, to use the words of the preamble, "of the utmost importance to the trade and commerce of these kingdoms," but the mere particular enumeration in the enacting clause of the several instruments, the safe conveyance of which was intended to be protected by this Act, puts this part of the case beyond all doubt, for they are all of them instruments which, if legal, give the party to whom they belong a direct authority to receive the monies to which they respectively relate; and although money itself is not mentioned, that was probably because no sum so large could be sent in the course of the post, as to make it necessary to protect it from depredation by the penalties of death. It is said that the Legislature, by 7 Geo. III. c. 50. created an entire new felony; that it is not exclusively confined to cases of instruments that may be legally enforced; and that it is a capital offence to secrete or steal a draft purporting to be for the payment of money, although it is ineffective and invalid for the purposes it imports; but it might as well be said that a forged draft or forged bill of exchange would be within the meaning of the Act. But the meaning of the statute, and not the mere words of it, are to be attended to, and the cases *Rex* v. *Mary Mitchell* (1), *Rex* v. *Locket* (2), *Rex* v. *Williams* (3), *Rex* v. *Eller* (4), and *Rex* v. *Clinch* (5), on the statute 7 Geo. II. c. 22. against forging an order for the payment of money or delivery of goods,

(1) Foster's Crown Law, p. 119.

(2) *Ante*, page 94. Case 53.

(3) *Ante*, page 114. Case 69. (4) *Ante*, page 898. Case 156. (5) *Ante*, page 540. Case 244.

shew that the order forged must be such an order that, if it had been genuine, is compulsory, and could have been legally enforced. It must be such an order as the party purporting to make it would, if the transaction had been fair, have a right to call for the performance of. But the case of *Rex* v. *Moffatt* (1) is still stronger to this effect. Is, then, the draft in the present case such a draft for the payment of money as could have been legally enforced? It certainly is not. The draft, it is true, appears on the face of it to be dated "*London*, 7 May 1800;" but it was proved to have been drawn on that day by *David Thompson*, at *Teston*, near *Maidstone*, in the county of *Kent*, and by the statute 31 Geo. III. c. 25. which repeals the stamp duties imposed by 23 Geo. III. c. 49. a stamp duty of one shilling and sixpence is imposed on every piece of vellum, parchment, or paper, on which shall be engraved, written or printed, any draft for the payment of money on demand exceeding one hundred and not exceeding two hundred pounds, to which a further duty of sixpence is added by 37 Geo. III. c. 90. But it is provided by the 31 Geo. III. c. 25. s. 4. "That nothing in this Act shall extend to charge any draft for the payment of money on demand, bearing date on or before the day on which it shall be issued, and at the place from which it shall be issued, and drawn upon any banker *residing within* TEN MILES *of the place where such draft shall be actually drawn and issued.*" It is true that the same statute 31 Geo. III. c. 25. s. 6. makes the persons drawing such drafts contrary to the Act answerable for the duty, and by the tenth section imposes on them a penalty of twenty pounds for every offence, but by the eleventh section it prohibits all persons from drawing drafts contrary to the Act, and by the nineteenth section ordains, "That all such vellum, parchment or paper shall be previously stamped; that no draft for the payment of money liable to the duties by the Act imposed, shall be pleaded or given in evidence in any Court, or admitted in any Court to be good, useful or available in law or equity, unless it be stamped; and that it shall not be lawful for the

(1) *Ante*, page 431. Case 200.

1800.

POOLEY'S CASE.

" Commissioners to stamp the same, after any draft for the pay-
" ment of money shall be written thereon, under any pretence
" whatever."—But by 37 Geo. III. c. 136. s. 5. a draft for the payment of money, stamped with a stamp of a different denomination than is required by 31 Geo. III. c. 25. if the same shall be of equal or superior value to the stamp required, may, on payment of the duty, and a penalty of forty shillings if stamped before the draft is due, or of ten pounds after it is due, be stamped with a proper stamp, and thereby rendered of the like force and validity as if it had been originally drawn on proper stamped paper. This draft therefore is of no legal value, and the payment of it could not have been legally enforced, for although the bankers, from the circumstance of its having been dated " *London*", paid it, though unstamped, to the prisoner or his agent, it was a payment made on a void authority, and if it had not involved a felony, might have been recovered back again by action from those who received it; but supposing it was paid by the bankers with full knowledge of the fact, that will not alter the nature of the case, for no agreement or connivance between the parties to a draft can, in this case at least, controul the law, for it would be making a statute, which had for its object the protection of the fair trader, by giving security to the conveyance of *choses in action*, and other valuable muniments, a complete shield against an attempt to defraud the revenue: no agreement therefore between the drawer and the drawee of this draft can render it valid, for such an agreement would be a conspiracy to violate the law. It is a draft drawn contrary to the directions of the Legislature, who by the 31 Geo. III. c. 25. have declared that a draft so drawn shall not "be pleaded or given in evidence in any court, or admitted in any court to be good, useful or available in law or equity." In the case of *Rex* v. *Moffatt* (1), a bill not drawn pursuant to the statutes 15 Geo. III. c. 51. and 17 Geo. III. c. 30. was decided not to be the subject of forgery, and although by these statutes all drafts not drawn in the particular form thereby prescribed, are declared to be void, yet the words of

(1) *Ante*, page 431. Case 200.

1800.

POOLEY'S CASE.

the 31 Geo. III. c. 25. though different in form are in effect the same, for a draft "not good in any court," must be "to all intents and purposes void." The cases indeed of *Rex* v. *Hawkeswood* (1), and *Rex* v. *Colin Reculist* (2), may appear to militate against this argument, but questions on *forgery* in those cases, and in *larceny* as in the present case, are widely different; for though in forgery it may be no consideration whether the instrument be valuable or not, provided it appear on the face of it to be such an instrument, as, if genuine, would be valuable, yet in larceny both at the common law and on this statute 7 Geo. III. c. 50. value is absolutely necessary; but an illegal instrument, an instrument that the Legislature has expressly forbidden to be drawn, can be of no value. But supposing this draft to be admissible in evidence on this indictment, though not stamped as the statute directs, it does not prove the allegation of the indictment that the said draft "then and there was *in force*, and the property "of the said *David Thompson* and the sum of money made "payable and secured thereby, unsatisfied." The statute 2 Geo. II. c. 25. s. 3. to which this allegation alludes, enacts "That if any one shall steal or take by robbery any exchequer orders or tallies, or other orders intitling any other person or persons to any annuity or share in any parliamentary fund, or any Exchequer bills, Bank-notes, South Sea bonds, East India bonds, dividend warrants of the Bank, South Sea Company, East India Company, or any other Company, Society or Corporation, *bills of exchange*, navy bills or debentures, goldsmiths' notes for payment of money, or other bonds or warrants, bills or promissory notes for payment of any money being *the property* of any other person or persons, or of any corporation, notwithstanding any of the said particulars are termed in law a *chose in action*, it shall be deemed and construed to be felony of the same nature, and in the same degree and with or without the benefit of clergy in the same manner, as it would have been if the offender had stolen or taken by robbery any other goods of like *value* with the *money due* on such orders, &c. or secured thereby and remaining unsatisfied, and such offender shall suffer such

(1) *Ante*, page 257. Case 129.

(2) *Ante*, page 703. Case 290.

1800.

POOLEY'S CASE.

punishment as he or she should or might have done if he or she had stolen other goods of *like value* with the *monies due* on such orders, &c. respectively, or secured thereby and remaining unsatisfied." This allegation, under this statute, is a *material allegation;* and its being so strengthens the observations I have already made, to shew that the instrument secreted or stolen must be, at the time the offence is committed, valid for the purposes for which it purports to be drawn, for if at that time the money due thereon has been paid and satisfied, it is not within the statute. It has been the constant and universal practice in all indictments on this statute to insert such an allegation; but even if it were not material, yet being inserted and not being an *immaterial allegation*, it must necessarily be proved, *Bristow* v. *Wright* (1), *Rex* v. *Durore* (2). But the production of the draft in the present case so far from proving the truth of this allegation, absolutely negatives it, inasmuch as for want of a stamp it appears to be an instrument which cannot be *inforced*, which cannot import any property in the drawer, which cannot secure any sum of money, and on which of course nothing can be due and unsatisfied. It is an instrument of no value except as to *the paper* on which it is written, and the indictment is not for stealing *the paper*, but for secreting the letter and stealing the draft. The *four last counts* indeed, on account of the want of value in the instrument stolen, seemed to be abandoned by the counsel for the prosecution (*a*), and surely the same reason will apply to the *four first counts*, which are founded on the same section of the statute 7 Geo. III. c. 50; for it was never yet held that a different construction shall prevail on the same instrument in the same section of an Act creating a capital felony.

(1) Dougl. 460.

(2) *Ante*, page 351. Case 171.

1 Hawk. P. C. c. 38. s. 22.

ABBOTT, *for the Crown.* Whatever may be the question on the *four last counts*, charging the prisoner with having feloniously stolen this draft out of the letter, judgment must

(*a*) The counsel for the Crown was heard on 15th December, and the counsel for the prisoner on the 22d December.

1800.

POOLEY'S CASE.

be given against him if it shall appear that the verdict is right on any one of the *four first counts*, charging him with having feloniously secreted the letter in which the draft was inclosed. The objection to this verdict is founded on an idea that an unstamped draft cannot be the subject of *larceny*, and that, by analogy, it cannot be within the statute 7 Geo. III. c. 50. But a draft not stamped, though it cannot be given in evidence in any action brought thereon to recover its value, is not to all intents and purposes void and of no effect; for it has been decided (1), that a forged draft drawn on unstamped paper may be given in evidence not only on an indictment for a forgery, but in an action for the recovery of the penalty. It is good for the purpose of defeating the effect of a wrongful act, but bad and unavailable as a means of enforcing it. The question, therefore, is, Whether the draft in the present case, not being stamped as the statute 31 Geo. III. c. 25. & 37 Geo. III. c. 90. require, can be the subject of that offence with which the prisoner is charged by this indictment. If this indictment had been framed for *the larceny* on the statute 2 Geo. II. c. 25. it might perhaps have been questionable, whether the prisoner could have been legally convicted thereon, as *a draft for the payment of money*, is not *eo nomine* mentioned therein; and as the instruments enumerated are such as, by retaining a value, may be legally *in force*, for the money due and unsatisfied thereon: but it is framed entirely on the statute 7 Geo. III. c. 50. which expressly makes it a capital offence for any person employed by the Post-Office, to *secrete a letter* in which *a draft for payment of money* is inclosed, or to steal such a draft out of any letter in which it may be contained. This offence, therefore, is quite different and distinct from the offence of stealing a *chose in action*, under the 2 Geo. II. c. 25. as will most clearly appear, first, from the different objects of the Legislature in passing the two statutes of 2 Geo. II. c. 25. and 7 Geo. III. c. 50. and secondly, from the different words in which they are respectively expressed. The object of the 2 Geo. II. c. 25. was intended to apply the rules of the common law to a new species of valuable property brought into use in modern times, and in pur-

(1) In Rex *v.* Hawkeswood, *ante*, page 257. Case 129. Rex *v.* Reculist, *ante*, page 708. Case 290. Rex *v.* Lee, *ante*, page 20. Case 9.

See Mr. Scarlet's argument in the Case of Rex *v.* Walsh, *post*.

1800.

POOLEY'S CASE.

suance of this object the second section enacts, "That any person who shall steal or take by robbery any of the securities for money therein mentioned shall, notwithstanding they are deemed *choses in action*, be guilty of felony, of the same nature and degree as if he had stolen other goods of the like value, with the money due on such instruments, and secured thereby, and remaining unsatisfied." These words evidently shew, that the Legislature meant only to provide against the stealing of those instruments by which the payment of money could be legally inforced; for the concluding words have no application but to such instruments as, by their own force, give to their rightful possessor a direct and immediate right to money or stock, and of course a note or bill, the value of which has been extinguished by payment, would not, however important to the holder, as a voucher of the payment made by him, and as evidence of a discharge, be within the Act. But the object of the Legislature in passing the 7 Geo. III. c. 50. was to secure the conveyance of every instrument, whether immediately valuable or not, that might be sent by the Post, and to protect the revenue arising from the postage of letters. This appears, not only by the preamble, and by the second section of the Act, which makes it a capital felony to steal a letter out of the Post-Office, whether containing any instrument or not, but by the very clause on which the charge is founded, which mentions other instruments that give no direct immediate legal right to money or stock, as "State Lottery Tickets," upon which nothing may ever become due; "Bank receipts for loans," which is only an evidence of payment of money on a particular account; "letter of attorney to receive dividends, or sell stock," which is not a security for payment of money, nor can any thing be due upon it. This shews that the 7 Geo. III. c. 50. was not made in *pari materia* with 2 Geo. II. c. 25. and that the Legislature had very different objects in view when they passed these statutes. The 7 Geo. III. c. 50. creates *a new crime*, quite distinct from that of larceny, which requires the property stolen to be of some *value*; but this Act is silent as to value, and was intended to protect the transmission of all

1800.

POOLEY'S CASE.

instruments whatever, whether money was due and unsatisfied on them or not. In the case of *Colin Reculist* (1), MR. JUSTICE GROSE, in delivering the opinion of the Judges, says, "the proposition arising from the objection is, that the paper writing stated in the indictment is not a promissory note, because it is not on a stamp; but the question whether it is or is not a promissory note, depends upon the tenor of the instrument, and not upon the circumstance of its being stamped or not." The decision in *Moffatt's Case* proceeded on the words of 15 Geo. III. c. 51. and 17 Geo. III. c. 30. which enacts that all notes drawn contrary to the directions of those Acts *shall be void;* but the 31 Geo. III. c. 25. does not declare that the several instruments therein enumerated shall be void, if they are not stamped; but that they shall not be pleaded or given in evidence in any Court, or admitted in any Court to be useful or available, &c. *as an acknowledgment of any debt*, &c. The draft in the present case does not appear, upon *the face of it*, to require a stamp, for it does not purport to be drawn above ten miles from London; and though it may be admitted that it could not have been given in evidence for the purpose of enforcing the payment, being unstamped, yet it may be given in evidence for the purpose of preventing the property conveyed by the Post from being stolen (*a*).—As to the allegation in the indictment "that the draft was then and there *in force*" not having been proved, if my construction of the meaning of the 7 Geo. III. c. 50. be right, it is an *unnecessary allegation* and need not be proved; but the words may be rejected as surplusage; and he cited as to this point *Pippin* v. *Solomon* (2), and the case of of *Rex* v. *Jenks* (3).

(1) *Ante*, page 703. Case 290.

(2) 5 Term Rep. 498.

(3) *Ante*, page 774. Case 298.

THE opinion of the Judges was never publicly communicated; but a pardon was granted to the prisoner for the *specific* offence charged upon him by the indictment, in order that he might be indicted on 7 Geo. III. c. 50. s. 2. for *stealing the letter* out of the Post-Office.

(*a*) Lord Eldon, then Chief Justice of the Common Pleas, observed, that the Legislature had not made it a felony to secrete any letter, but to secrete any letter containing any of the particular securities specified in the statute.

1801.

CASE CCCXXI.

THE KING *against* POOLEY.

THE SECOND CASE.

On an indictment on the 7 Geo. III. c. 50. s. 2. for *stealing a letter out of the Post-Office*, A CHECK or banker's draft contained in it, though drawn on *unstamped* paper, may be received in evidence for the purpose of proving the fact of *stealing the letter*.

S. C. 1 East, Add. xvii.

S. C. 3 Bos. & Puller, 315.

AT the Old Bailey in January Session 1801, *Benjamin Pooley* was tried before MR. JUSTICE LAWRANCE, present MR. BARON THOMPSON and MR. BARON GRAHAM, on the statute 7 Geo. III. c. 50. s. 2.

THE indictment consisted of Six Counts. THE FIRST COUNT charged that he, on the 6th June 1800, feloniously did steal and take out of a certain Post-Office, to wit, the Chief Penny Post-Office, situate, &c. one letter, theretofore sent by the Post to the said Post-Office for, and to be delivered to a person at *Mile End*, London, that is to say, one *Archibald Thompson*, &c. and one other letter, against the peace, &c. THE SECOND COUNT charged the letter to have been stolen from a certain house for the receipt and delivery of letters, &c. THE THIRD COUNT stated it to be a certain place for the receipt and delivery of letters sent by the Post, &c. and THE THREE LAST COUNTS were the same as the three first, only calling it *a packet* instead of *a letter*, the whole concluding against the form of the statute in such case made and provided.

THE EVIDENCE.—The letter was traced, by the evidence of several witnesses, from the hands of the writer *Mr. David Thompson*, at *Teston*, near *Maidstone*, where it had been written on May 5, 1800, through the Maidstone Post-Office, to the hands of the prisoner, as a *letter-carrier* for the General Post-Office in London, and it was proved to have contained, when put into the *Maidstone* Office, a draft for the payment of money, of which the following is a copy:

No. 5. LONDON AND MIDDLESEX Bank.

Messrs. Edwards, Templar, Middleton, Johnson, and *Wedgwood*, *Stratford Place, London*, 7th May, 1800.

PAY to *Mr. Archibald Thompson*, or bearer, Two Hundred Pounds, for

D. THOMPSON.

£200 0 0

1801.

POOLEY'S CASE.

THIS draft was drawn by *D. Thompson*, at *Teston*, a place distant from *Stratford Place* about 30 miles, on the 5th May, 1800, and it was proved that the prisoner had shewed the letter and given the draft to a man of the name of *Charles Hill*, who had received the money for it at the banking-house in *Stratford Place*, as stated more fully in the preceding case.

KNOWLYS, *for the prisoner*, objected, that it could not be given in evidence as a medium to shew that the prisoner had stolen the letter, because it was not stamped.

FIELDING, WOODFALL, ABBOTT and MYLES, *for the Crown*. It is not attempted to give this instrument in evidence as a draft for the payment of money, or as any other document which the Legislature has directed to be stamped. The question asked of the witness is, Whether that is *the piece of paper* which he received from the prisoner. It is perfectly immaterial what is written on it, except as it may tend to establish its identity, and shew that it was contained in *the letter* which the prisoner is charged with having feloniously taken from the Post-Office. Suppose the indictment had been for *stealing a letter* which had happened to contain a supposed half-guinea, but which in fact had been a medal or piece of lead, exactly resembling that piece of the gold coin, the medal might surely be given in evidence to shew that the letter which contained it was the letter the prisoner had stolen. So in the present case this *piece of paper* may be given in evidence, to shew that *the letter* in which it was contained was in the possession of the prisoner. The words of the Stamp Act 31 Geo. III. c. 25. s. 19. are, that no draft for the payment of money not stamped as this Act directs "shall be pleaded or given in evidence in any court, or admitted in any court to be good, useful, or available in law or equity." These words unquestionably are very extensive: but the true construction of them is that no unstamped instrument shall be given in evidence, so as to render it *a good and valid instrument* to the party holding it. The object of the Legislature was to prevent these kind of instruments from being circulated, until they had paid the duties respectively imposed on them, and therefore the statute has made them useless and

1801.

POOLEY'S CASE.

unavailable to the holders. It is perfectly clear from the cases of *Rex* v. *Hawkeswood*, and *Rex* v. *Colin Reculist*, that such an instrument as the present may, if forged, be given in evidence against the party forging or knowingly uttering it. It is also clear that such an instrument though not forged, may be given in evidence against the party who shall make it upon unstamped paper, for the purpose of recovering the penalty inflicted by the statute against making it on paper not duly stamped; but this, if the words of the statute are to be taken literally, could not be done, which shews evidently the meaning of the Legislature, and the manner in which the words of the 31 Geo. III. c. 25. s. 19. are to be construed. It is not offered, upon the present occasion, in evidence, as a good and valid draft for the payment of money, but merely as a piece of paper on which something, no matter what, is written, in order to shew that it was the piece of paper which *David Thompson* inclosed in the letter, and the prisoner took out of it. The question here is very different from that which arose in the former indictment, for this indictment makes no mention of any draft for the payment of money, and therefore it is of no concern whether it is valid or not. Suppose the letter had been torn, and any part of it had been found upon the prisoner, the part so found might surely have been given in evidence for the purpose of comparing it with the other part of the letter, in order to prove that the prisoner had the whole, and this draft having been inclosed in the letter, must be taken to have been a part of it, coming out of the prisoner's possession.

Ante, page 887. Case 320.

KNOWLYS *for the prisoner.* The instrument now attempted to be given in evidence appears to the inspection of the Court to be a draft for the payment of money not stamped as the Legislature has required; for although it appear on the face of it to be drawn in *London* on a banker in the same city, yet it is proved in evidence to have been in fact drawn at such a distance as to render it liable to the stamp duties. But the Counsel for the Crown, conscious of its invalidity, wish to vary its nature, and attempt to give it in evidence as a thing of a different description from that which on the face

of it, it imports to be. If this could be done, the comparison which has been made between this instrument and a medal resembling a half-guinea would be in some degree parallel; but the difference is that the law has not forbidden such a medal to be given in evidence, but has expressly directed that no such instrument as the present "shall be given in evidence in any court, or admitted in any court to be good, useful, or available in law or equity." And the prosecutor cannot be allowed to deprive the prisoner of the advantage which this clause has so expressly given him, by considering the paper in any other character than that which really belongs to it, of an unstamped draft for the payment of money. The first member of the clause is, that no such instrument "shall be given in evidence in any court," the meaning of which must be that it shall not be given in evidence on any occasion like the present; and the succeeding member "or admitted in any court to be good, useful, or available in law or equity," imports that the party holding it shall not avail himself of it as a good and valid instrument: and on this distinction it was that the cases of *Rex* v. *Hawkeswood* (1), and *Rex* v. *Reculist* (2), were decided; for since those decisions, in a case at *Nisi Prius* in the Court of Exchequer, an unstamped receipt which was produced not as an acquittance, but as evidence of a transaction collateral to the point in issue, were refused to be received. The first part of the clause says, such an unstamped draft shall not be received in evidence in any court, and the second that the party shall not recover on it: and as to the admissibility of it on an indictment for forgery, and in an action to recover the penalty, they are exceptions arising *ex necessitate rei*, and not to be extended beyond the precise line which that necessity requires.

(1) *Ante*, page 257. Case 129.

(2) *Ante*, page 703. Case 290.

THE COURT. The question how far a note unstamped may be given in evidence, came under the consideration of THE TWELVE JUDGES, in the case of *Rex* v. *Moreton* (3), which was reserved by MR. JUSTICE LAWRANCE at York Assizes, in which case it was determined, that though an unstamped draft cannot be received in evidence so as to render it "good, useful, or available" to the party who is possessed of it, as and

(3) *Ante*, page 258, *notis*, and reported more fully, 2 East, C.L. 955, 956.

1801.

POOLEY'S CASE.

for a good and valid instrument, yet that it may be received in evidence for *collateral purposes*, and on this precedent the case of *Rex* v. *Colin Reculist* (1) was decided. The stamp acts are revenue laws, and were passed for the purpose of enabling the crown to collect such sums as the duties thereby imposed might produce, and not to enable men to commit felonies with impunity. The clause in 31 Geo. III. c. 25. s. 19. has been argued upon as if it was applicable to different purposes, but that cannot be, for if the words "shall not be given in evidence in any court," were taken to be a distinct and substantive member of the clause, such an instrument could not be given in evidence on any occasion or for any purpose; but it has been decided by the cases before mentioned, that it may be given in evidence on an indictment for forging it, or in an action to recover the penalty, or for other collateral purposes, as was expressly said by MR. JUSTICE GROSE in delivering the opinion of the Judges, in the case of *Rex* v. *Colin Reculist* (2). We therefore are perfectly satisfied that the paper writing now produced ought to be received in evidence on the present occasion, and although we have now no doubt on the subject, if hereafter any doubt should occur to any of us, the point shall be submitted to the consideration of THE TWELVE JUDGES.

(1) *Ante*, page 703. Case 290.

(2) *Ante*, page 703. Case 290.

CASE CCCXXII.

THE KING *against* BENJAMIN POOLEY.

THE THIRD CASE.

The second section of 7 Geo. III. c. 50. making it felony to steal a letter out of the Post-Office, does not extend to servants of the Post-Office.

3 Bos. & Puller, 311.

BUT after the foregoing point of the case was determined, THE COURT expressed a doubt whether the second section of the statute 7 Geo. III. c. 50. on which the indictment was founded, extended to servants or persons employed in the business of the Post-Office, and the record of the indictment, and the Sessions paper, in the case of *Rex* v. *Shutt*, at the Old Bailey in July Session 1774, was sent for, by which it appeared that he was charged with having feloniously taken and carried away from the General Post-Office two letters, each containing a *quarter guinea piece*, leaving out the usual words "he being

1801.

POOLEY'S CASE.

a person employed in the General Post-Office," but concluding "against the form of the statute," and on its appearing in evidence that he was a *sorter of letters* at the General Post-Office, he was acquitted (*a*).

On this doubt the following case was submitted to the opinion of THE TWELVE JUDGES.

"THE prisoner was tried before me at the Old Bailey in last January Session, and found guilty, on an indictment founded on the statute 7 Geo. III. c. 50. s. 2. charging him with stealing out of the Post-Office a letter sent to be delivered by the post. It appeared in evidence that the prisoner was employed in the Penny-Post department, as a *charge-taker* and as *a letter-carrier*, and that as charge-taker the letters arriving by the General Post which were to be delivered by the carriers of the Penny-Post of the Eastern division, were delivered to him to be divided according to the different walks of the letter-carriers, and that he did not deliver the letter, the subject of the indictment, to the letter-carrier within whose walk the person lived to whom it was directed; that he afterwards opened it, and took out of it, *a cheque* or draft for 200*l.* on the *Stratford Place Bank*, drawn on unstamped paper, by a person living above thirty miles from *Stratford Place*. It was objected for the prisoner that this draft being an unstamped paper, could not be received in evi-

(*a*) It appeared in evidence in this case of Rex *v.* Skutt, that he had been employed in the General Post-Office as a sorter of letters, for about two years previous to this transaction; that on his being apprehended he was searched by one *Thomas Kemp*, who found the two letters stated in the indictment concealed in his breeches; that the said letters had been opened, and that neither of them then contained any money or any security for money; but it was proved by the writer of them, *Hannah Ball*, that, at the time they were put into the post-office in the country, each of them contained a five and threepenny piece of gold coin; that the bag from the country came safely to *London*; and that the said letters had been delivered to the prisoner as a sorter of letters. His counsel contended that this was not a case within 7 Geo. III. c. 50. s. 2. he being a sorter of letters, and the letters in question having been intrusted to his care, and upon this objection he was acquitted; but he was afterwards tried for stealing the two five and three-penny pieces, and found guilty, and transported.

1801.

POOLEY'S CASE.

dence as a medium to shew that the prisoner had stolen the letter; but the Court overruled the objection, being of opinion that the draft, though unstamped, might be received in evidence for collateral purposes, though not for the purpose of recovering the money contained in it. But the Court entertained doubts whether the second section of the Act applied to servants of the Post-Office, against whose misconduct the first section of the Act was intended to guard, and from which it may be inferred that the Legislature did not conceive that the embezzling of a letter by those servants was a larceny. See *Leach's Crown Cases, page* 106.; according to which, NARES and WILLES *Justices*, and GLYN, Serjeant Recorder, were of that opinion in the case of one *Skutt* (1).

(1) *Ante*, page 106. Case 63.

January 22d, 1801. S. LAWRANCE.

THIS case was argued in the Exchequer Chamber on Saturday 2d May 1801, before all the Judges except the Lord Chief Justice of the Common Pleas, by KNAPP *for the prisoner*, and by ABBOTT *for the Crown.*

KNAPP *for the prisoner.* Penal statutes, especially those which affect life, must be strictly construed; and the several sections of each of them be restrained to the precise object which the Legislature had in view when they were passed. There are two statutes which relate to the subject of the present case; the first is the 5 Geo. III. c. 25. s. 17, 19, and 20. and the second is the 7 Geo. III. c. 50. on the *second section* of which this indictment is founded. The first section of this last statute is confined to *persons* acting in the capacity of "deputy, clerk, agent, letter-carrier or rider, or employed in receiving, stamping, sorting, charging, carrying or delivering letters, or in any other business relating to the Post-Office;" and this section corresponds exactly with the 17th section of 5 Geo. III. c. 25. The second section of 7 Geo. III. c. 50. enacts, "That if *any person or persons whatsoever* shall steal and take from or out of any Post-Office or house, or place for the receipt or delivery of letters or packets sent or to be sent by the post, any letter or letters, packet or packets, he shall suffer death without benefit of clergy." This clause

1801.

POOLEY'S CASE.

cannot apply to *servants in the Post-Office*, because the first section had before enacted all that the Legislature intended to enact, as applicable *to them*, and it must be considered as a separate clause applying exclusively to *other persons*. The indictment charges, that the prisoner did *feloniously steal and take* this letter out of the Post-Office; but it appears by the evidence that it was *delivered* to him as *a servant of the Post-Office*. It is therefore only a *breach of trust*, and not being one of those breaches of trust which the Legislator has made a felony, he ought not to have been found guilty of this charge: for the statute of 9 Anne, c. 10. s. 40. the 5 Geo. III. c. 25. s. 17, 19, and 20. respecting persons employed in the Post-Office; the 15 Geo. II. c. 13. s. 12. respecting the clerks employed in the Bank of *England*; the 22 Car. II. respecting the embezzling of naval stores; the 39 Geo. III. c. 81. respecting the clerks of merchants and bankers, and particularly the case of *Rex* v. *Waite* (1), and *Rex* v. *Bazeley* (2), shew that servants to whom property has been delivered for the use of their respective employers, cannot at Common Law be guilty of larceny by converting it to their own use (*a*). But the case of *Rex* v. *Skutt* (3), is decisive of the present case; for it appears by the record of the indictment in that case, that he was charged, not as being a person employed in the General Post-Office, but in his private capacity, with having stolen and carried away from *The General Post-Office* two letters, the one directed to *The Widow Bill*, and the other to *Mr. Wood*, and it appearing in evidence that he was a *sorter of letters* in the Post-Office, it was held by the court that he was not within the second clause of this statute. In this indictment also it was alleged, that the letters stolen were each of them of the value of 5*s.* 3*d.* and the property of the respective persons by whom they were written. But the present

(1) *Ante*, page 28. Case 14.

(2) *Ante*, page 335. Case 311.

(3) *Ante*, page 106. Case 68.

(*a*) MR. JUSTICE HEATH. There never was any doubt among the Judges in *Bazeley's Case*, whether a servant, as such, might not be guilty of larceny, but the difficulty there, and upon which the decision proceeded, was that the money being paid to the servant for the master, was taken by the former before it ever came to the possession of the latter, by being put into the till. S. C. 3 Bos. & Pull. 317.

1801.

POOLEY'S CASE.

indictment is erroneous, inasmuch as it does not allege the letter to be the *property* of any person, or to be of any *value*, both of which are essential in a charge of larceny.

ABBOTT, *for the Crown.* The objection as to the defects of the indictment in not affixing a value to the letter, and stating it to be the property of some person, is not founded, for a letter merely as such cannot be of value to any person. As to the other objection, the first section of the 7 Geo. III. c. 50. is *confined as to person* but *open as to place*, and the second section *open as to person* and *confined as to place*, and being open as to person, and expressly in terms applying to "all persons whatsoever," must necessarily include persons belonging to the Post-Office; for this statute was intended to give a greater security upon this subject than had been provided for by the 5 Geo. III. c. 25. s. 18. It is true that a penal statute is to receive a strict and literal construction, and cannot be extended beyond the clear and apparent meaning of the Legislature; but that meaning must be collected and sought for, without doing violence to the words in which it is made; and unless it can be shewn that the words "any person whatsoever" mean other persons than those belonging to the Post-Office, they must, according to the fair and natural import of such words, be comprehended within them. Would any person who should rob the mail on the highway be exempted from the penalties of this section because he happened to belong to the Post-Office? and if not, the clause cannot be general and unlimited as to one part of it, and limited and restrained as to another. The words "If any person or persons whatsoever shall steal, &c." must mean any person who was in a situation to steal, and the prisoner was a person in such a situation: considering it therefore as a case of larceny, it is true that a person who obtains the unqualified possession of the property of another cannot be guilty of theft by taking it feloniously away, but the prisoner was neither the bailee, nor the trustee of this letter; he was merely the servant of the public acting in the department of the Post-Office, who in such capacity is called upon by the statute of 5 Anne to take the oaths accordingly. The prose-

cutor, in putting this letter into the Post-Office at *Maidstone*, did not thereby deliver it to the prisoner in *London*; and as to the case of *Rex* v. *Waite*, that was the case of a private corporation, and therefore not applicable to the present, for the prisoner was not the servant of those to whom the letter belonged, but the servant of the Crown. But suppose the letter to have been delivered to the prisoner as a bailee, he only gained a qualified trust by the delivery, for he was employed to sort the letters and to hand them over to other carriers, and then this letter ought to have been handed over by him: he had no right to take the letter out of the office. This shews that he had the *bare charge* and oversight of it only, and not the custody or *legal possession* of it, which brings his case into similitude with the cases of the butler, cook, shepherd, or other servants who may clearly be guilty of larceny by taking the things committed to their care feloniously away. His situation is more like that of a confidential servant or clerk to a merchant or banker, and it has been recently determined in *Rex* v. *Chipchase* (1), that if such a person take a bill of exchange from the counting-house of his master and convert it to his own use, he is guilty of felony, and not of a breach of trust only. This case is clearly within the mischief which the statute 7 Geo. III. c. 50. s. 2. was intended to prevent; and if servants of the Post-Office are not within this second section, it will follow that those persons who have certainly the greatest opportunity of committing this crime will be exempted from the punishment of it.

Ante, page 28. Case 14.

1 Hale, P. C. 505.

(1) *Ante*, page 699. Case 227.

THE JUDGES, on comparing the 2d section 7 Geo. III. c. 50. with the first and third sections of the statute, were of opinion that the 2d section of 7 Geo. III. c. 50. does not extend to the servants of the Post-Office, and that therefore the conviction was wrong (*a*). The prisoner, therefore, on the 10th July 1800, received a pardon, and was discharged.

23 June, 1802.

(*a*) The 42 Geo. III. c. 81. extends the provisions of the statute 7 Geo. III. c. 50. s. 1. to any part or parts of any of the securities, and to all persons who shall be accessaries before or after the fact of committing any of the offences therein mentioned; and the 52 Geo. III. c. 143. s. 2. re-enacts the same and makes the principal liable in the county where the

1801.

FOOLEY'S CASE.

offence is committed or the offender apprehended, and the accessaries liable as well before as after the trial or conviction of the principal felon; and whether the said principal felon shall have been apprehended or shall be amenable to justice or not. But there does not appear to be any clause in either of these statutes by which a servant of the Post-Office who is entrusted with a letter, may be punished for secreting, embezzling, or stealing such letter, unless it contains some or one or part of the securities enumerated in the statutes.

CASE CCCXXIII.

THE KING *against* ANDREW THOMPSON.

An indictment for forging the word "*Settled*" at the bottom of a bill of parcels importing that the bill had been paid, must shew by proper averments that it is a *receipt*, although 35 Geo. III. c. 55. says that such a memorandum shall be deemed and taken to be a receipt.

AT the Old Bailey in January Session 1801, *Andrew Thompson* was tried before MR. BARON THOMPSON, present MR. BARON GRAHAM, for forgery.

THE indictment stated that *Andrew Thompson*, on the 5th December 1800, with force and arms at the parish aforesaid, in the county aforesaid, feloniously did falsely make, forge and counterfeit, *a certain receipt* for money, to wit, for the sum of one pound one shilling and sixpence, which said false, forged and counterfeited *receipt for money* is as followeth, that is to say, "Settled, J. M." with intention to defraud *Bartholomew Ruspini*, *Thomas Hawkes*, and others (naming them) the subscribers to a certain institution then called The British National Endeavour, against the form of the statute in such case made and provided, &c. The second count was for uttering the receipt with the like intention. The third and fourth counts were for forging and uttering the receipt with intention to defraud *William March*, *James Sibbald*, *Josias Henry Stacy*, and *William Fontleroy*. The fifth and sixth counts to defraud *Joseph Milward*, and the remaining six counts were the same as the six preceding, only calling it *an acquittance* instead of *a receipt*.

THE EVIDENCE.—The prosecutors were the trustees of a subscription fund, and the prisoner was employed to receive and pay the monies of the fund, and to provide whatever might be necessary for the purposes of the institution. He had accordingly ordered from Mr. *Milward*, a cooper, living

1801.

THOMPSON'S CASE.

at the *Seven Dials*, the several articles in the following bill, at the bottom of which he forged the words and letters, "Settled, J. M." and delivered it in to the Treasurer of the Society as a voucher for so much of his disbursement, without having paid *Milward* his bill.

Mr. *Thompson*.

Bought of *Joseph Milward*, cooper, *Earl-street, Seven Dials*.

1798.				
June 12.	To mending tubs - -	£0	3	6
Dec. 15.	To 2 new pails - -	0	5	0
1800.				
July 12.	To 2 tubs with handles -	0	12	0
	To 1 mop - - -	0	1	0
		£1	1	6

Settled, J. M.

KNOWLYS, *for the prisoner*, submitted to the Court that the words "Settled, J. M." as stated in the indictment, did not of themselves purport to be *a receipt for money*, and that therefore the indictment should have shewn by proper averments that it was in fact *a receipt* of that description, according to the determination in the case of *Rex* v. *Hunter*.

Ante, page 624. Case 275.

CONST, *for the Crown*, contended that this did purport to be a receipt made by a person who had a right to demand money; that the evidence proved that the right arose from the sale and delivery of goods according to the bill; and that it was sufficient if the instrument appeared upon the evidence to be of the description stated in the indictment: and he stated the case of *Rex* v. *Withers* (1) as a case precisely in point with the present. It was also contended, that as the statute 35 Geo. III. c. 55. sect. 7. for imposing a stamp duty on receipts had enacted, that "every note, memorandum, or writing whatever, signifying or denoting any debt, claim, account or demand being paid, *settled*, received, accounted for, balanced, discharged, released, or satisfied, whether the same shall or shall not be signed by or with the name or names of the person or persons by or on whose behalf the same shall be given, shall be deemed and taken to

(1) 1 East's Rep. 181, *notis*.

1801.

THOMPSON'S CASE.

be *a receipt* within the meaning of the Act," the necessity of averring such an instrument as the present to be *a receipt* was taken away.

BUT THE COURT, on the authority of the case *Rex* v. *Hunter* (1), was of opinion that the indictment was defective, and THE prisoner was acquitted.

(1) *Ante*, page 624. Case 273.

CASE CCCXXIV.

THE KING *against* JOHN WHITTINGHAM.

A servant embezzling money received from a customer to whom his master had given it for the purpose of trying the servant's honesty, is an offence within 39 Geo. III. c. 85.

AT the Old Bailey in February Session 1801, *John Whittingham* was tried before JOHN SILVESTER, ESQ. *Common Serjeant*, on the statute 39 Geo. III. c. 85.

THE indictment charged that the prisoner, on the 20th January 1801, was a servant to *John Gregory*, a potatoe merchant, and being such servant, did receive and take into his possession the sum of *seven shillings* from *Hannah Morris*, for and on account of his said master, and did afterwards feloniously embezzle and secrete the same; and, in manner and form aforesaid, did steal, take, and carry away from the said *John Gregory* the said sum of *seven shillings*, the monies of the said *John Gregory*, &c. There were two other counts for embezzling and stealing 64*l.* 1*s.* 3*d.*, upon which no evidence was given.

JOHN GREGORY was a potatoe merchant, and the prisoner was his servant, and having reason to suspect him of dishonesty, he procured a Mr. *Buxton* to mark a seven-shilling piece of *Gregory*'s money, and to send *Hannah Morris* with it to his shop to purchase potatoes, which she did to the amount of one shilling and three-pence, and for the payment of which she gave the prisoner the marked seven-shilling piece, who gave her, out of his own pocket, five shillings and nine pence in change, though he might have given the change out of monies belonging to his master, which had been left in the counting-house for that purpose. The seven-shilling piece was afterwards found secreted in the prisoner's box.

ALLEY, *for the prisoner*, objected that this was not a case within the Act, which he contended only applied to cases where the monies had been paid to the servant *by other persons* than the master, and not, as in this case, where the monies had come

1801.

WHITTINGHAM'S CASE.

intermediately from the hand of the master; and secondly that the charge being the embezzling of *seven shillings*, and the evidence shewing that only *one shilling and three-pence* had been received and not accounted for by the prisoner, the charge was not correctly proved.

THE COURT was perfectly satisfied that there was nothing in the first objection, for that if the servant receive the money either from the master, or from a *third person* on his master's account, it is sufficient (*a*). But the other objection was held fatal; for the evidence does not support the charge, because it appears that he only received and embezzled the sum of one shilling and three-pence.

THE prisoner was acquitted.

(*a*) See this point decided by THE TWELVE JUDGES in the Case of Rex v. William Keages, *post*, Old Bailey September Session 1809.

THE KING *against* EGGINTON AND OTHERS.

CASE CCCXXV.

Burglary cannot be committed in a centre building used merely as a partnership counting-house, but having no internal communication with the dwelling-houses which formed the wings.

The assent of a prosecutor, to give *facility* to the commission of a larceny, for the purpose of detecting the offenders, does not do away the felony, although the property was not taken *against his will*. 2 East, 494. 666. S. C. 2 Bos. & Pull. 508.

AT the Lent Assizes for the county of *Stafford* 1801, *John Egginton*, *Walter Egginton*, *Thomas Gibbons*, *John Foulds* and *William Foulds*, were tried before MR. JUSTICE LAWRANCE for a burglary.

THE indictment contained eight counts. THE FIRST COUNT charged them with breaking and entering the dwelling-house of *Mathew Robinson Boulton*, and stealing therein a quantity of silver goods and one hundred and fifty guineas, which were laid to be the property of *Mathew Boulton* and *John Hodges*; one hundred and fifty guineas the property of *Mathew Boulton*, *Mathew Robinson Boulton*, *James Watt*, and *Gregory Watt*; one hundred and fifty guineas the property of *Mathew Boulton*, *John Bonus*, and *William Nelson*; one hundred and fifty guineas the property of *Mathew Boulton*, *Benjamin Smith* and *James Smith*; and one hundred and fifty guineas the property of *Mathew Boulton*, *John Hodges*, *Mathew Robinson Boulton*, *James Watt*, *Gregory Watt*, *John Bonus*, *William Nelson*, *Benjamin Smith* and *James Smith*. The SECOND and THIRD counts, laid the place in which the burglary was

1801.

EGGINTON'S CASE.

charged to have been committed, to be respectively the dwelling-house of *John Bush*, and of *William Nelson*. The FOURTH COUNT charged the prisoners with stealing the property in the dwelling-house of the said *Mathew Robinson Boulton*, and burglariously breaking the house to get out of it against the statute. THE FIFTH COUNT was the same as the fourth, only laying it to be the dwelling-house of *John Bush*. THE SIXTH COUNT was for stealing the property in an out-house, belonging to the dwelling-house of the said *Mathew Boulton* against the statute. And THE SEVENTH and EIGHTH COUNTS were the same as the sixth, only laying the out-house as respectively belonging to *Mathew Robinson Boulton* and *William Nelson*.

IT appeared in evidence on the trial that the silver goods were the property of *Mathew Boulton* and *John Hodges*; that the hundred and fifty guineas were the property of *Mathew Robinson Boulton* and *William Nelson*, with whom *Mathew Boulton* was concerned in different manufactories, that is to say, with *John Hodges* as manufacturers of plated goods; with *William Nelson* and *John Bonus* as button-makers; with *James Smith* and *Benjamin Smith* as buckle-makers; with *Mathew Robinson Boulton*, *James Watt*, and *Gregory Watt* as engine-makers; and that, besides these, *Mathew Boulton* carried on two other manufactories on his own sole account. It further appeared that the money and part of the silver articles were kept in a counting-house, which was used for transacting the money concerns, and keeping the accounts of all the different businesses in which *Mathew Boulton* was engaged; that other part of the silver was in a room, being one of several, where the plate business was carried on, which rooms and counting-house formed *a centre building*, having two wings adjoining, consisting of dwelling-houses inhabited by persons engaged in *Mathew Boulton*'s manufactories; that one of them was inhabited by *Mathew Robinson Boulton*, but that had no internal communication with *the centre building*: At the time of the offence being committed, a room in his house, which communicated with *the centre building*, having been allotted to the purposes of the plating business with which he had

nothing to do, the door into it was shut up and a working bench placed against it, so as to stop up the passage; that a person of the name of *Bush*, a workman of *Mathew Boulton*, occupied another of the dwelling-houses in the same wing, from which house there was no way into *the centre building*, but that there was a window in it which looked into a passage, which ran the whole length of the centre building; that in the other wing is the dwelling-house of *William Nelson* the partner of *Mathew Boulton* in the button business, which has no internal communication with *the centre building*, and in that wing other persons live. That in the front of this building there is a terrace or front yard fenced round in different ways, and at the end of the pile of buildings above described, there is a wall with gates for horses and carriages, and a door for foot passengers. IT FURTHER APPEARED that the prisoners had, some time previous to the breaking into *the centre building*, applied to one *Joseph Phillips*, who was employed as watchman to the manufactory at *Soho*, to assist them in robbing it, to which he assented in the first instance, but immediately afterwards informed first some of *Mathew Boulton*'s servants and assistants, and afterwards *Mathew Boulton*, himself, telling him what was intended, and the manner and time the prisoners were to come; namely that they were to go into the counting-house, and that HE was to open the door into the front yard for them, that *Mathew Boulton* told him, in return, to carry on the business; and that he *Boulton* would bear him harmless; that *Mathew Boulton* also consented to his opening the door leading to the front yard, and to his being with the prisoners the whole time." In consequence of this information *Mathew Boulton* removed from the counting-house every thing but one hundred and fifty guineas and some silver ingots, which he marked for the purpose of furnishing evidence against the prisoners, and lay in wait to take them when they should have accomplished their purpose: that on the 23d December about one o'clock in the morning the prisoners came, and *Phillips* opened the door into the front yard through which they went along the front of the building, and round into another yard behind it called *The Middle Yard*, and from

1801.

EGGINTON'S CASE.

thence they and *Phillips* the watchman went through a door which was left open, up a staircase in *the centre building* leading to the counting-house, and to the rooms where the plating business was carried on: this door the prisoners bolted, and then broke open *the counting-house* which was locked, and the desks which were also locked, and took from thence the ingots of silver and guineas. They then went to the story above into a room where the plated business was also carried on, and broke the door open, and took from thence a quantity of silver, and returned down stairs, when *William Foulds* unbolted the door at the bottom of the stairs which had been bolted on their going in, and went into *the middle yard*, when all (except *William Foulds* who escaped) (*a*), were taken by the persons placed to watch them.

ON this case two points were made for the prisoners.

FIRST. That no felony was proved, as the whole was done with the knowledge and assent of *Mathew Boulton*, and that the acts of *Phillips* the watchman were his acts.

SECONDLY, That if the facts proved amounted to a felony, it was but simple larceny, as the building broke into was not the dwelling-house of any of the persons whose house it was charged to be; and that there was no breaking, the door being left open.

THE Jury found the prisoner guilty; but the learned Judge reserved the objections for the opinion of THE TWELVE JUDGES.

ON Saturday 9th May 1801, the case was argued in the Exchequer Chamber by CLIFFORD *for the prisoners*, and by MANLEY *for the Crown*.

CLIFFORD *for the prisoners* argued the second point first. The centre building in which this burglary is charged to have been committed, cannot be considered as a dwelling-house.

(*a*) He was apprehended subsequent to the conviction of his associates, and tried at the Spring Assizes at Stafford 1801, before Mr. JUSTICE LAWRANCE, and found Guilty of *the Larceny*, and transported. 2 Bos. and Pull. Rep. 514.

1801.

EGGINTON'S CASE.

It was not inhabited by any person, but was used exclusively as the counting-house of all the partners, and was therefore, in contemplation of law separated from the dwelling-house of *Mathew Robinson Boulton*, and from the other building which was occupied by *John Bush*. The separation indeed was not merely constructive, for it is stated that the two adjoining wings of the building which consisted of dwelling-houses occupied by *Mathew Robinson Boulton* and *Mathew Boulton's* workmen, had no internal communication with *the centre building*; for that, at the time the offence was committed, the door of the room in *Mathew Robinson Boulton's* house, which had originally communicated with *the centre building* was at that time shut up, and a working bench placed against it so as to stop the passage, and that there was no way into the building from *Bush's* house. The room also, the door of which had originally communicated with the counting-house, had been long appropriated to the purposes of the plating business, in which *Mathew Robinson Boulton* had no concern. It may perhaps be objected on the authority of the case of *Rex* v. *Gibson*, *Mutton* and *Wiggs* (1), that this counting-house is to be considered as part of the dwelling-house of *Mathew Robinson Boulton*, although there was no internal communication between them. But the two cases are materially different. In *Rex* v. *Gibson* and others the house and the shop were both under the same roof; and in the sole occupation of *Thomas Smith*, who let the shop together with some apartments in the house to one *John Hill* from year to year; the burglary was committed in the shop, to which there was no internal communication from the house, but both house and shop were inclosed within a brick wall, and therefore the whole premises were still considered to be the dwelling-house of *Smith*, though there was no internal communication from the shop to the house; but it was admitted that if the shop had been let by itself to a person not living in the house, it would then have been severed from the dwelling-house of *Smith*. But in the present case although *Mathew Robinson Boulton* was the sole occupier of the house in the wing of the building, yet the centre part which was used as

(1) *Ante*, page 357. Case 174.

1801.

EGGINTON'S CASE.

a counting-house, and in which the offence was committed, was completely separated from that wing, and neither belonged to him nor was it in his sole occupation, but in the joint occupation of the copartners. The case of *Rex* v. *Gibson* was quoted at the trial, and the learned Judge read from MR. JUSTICE BULLER'S manuscript note of that case, that "all the Judges held that if a shop be let separately, the breaking into it does not constitute burglary, because it is in such case separated from the house." In the present case the counting-house was let, by *Mathew Boulton, jointly to all the partners*, and was thereby separated from the house in which *Mathew Robinson Boulton* lived, "if" says *Lord Hale* 1 P. C. 557. "A have a shop, parcel of his mansion house, and it be broken open in the night, it is a burglary, and the indictment shall suppose that he broke and entered *domum mansionalem* of A, for it is parcel thereof; but if A let the shop to B for a year, and B holds it and works or trades in it in the day, but lodges in his own house at night, and this shop is broke open, &c. the indictment cannot be that *domum mansionalem* of A *fregit*, for it was severed by the lease during the time." And this doctrine is confirmed by the case of *Martha Jones* (1) where the burglary was stated to have been committed in the dwelling-house of *Thomas Smith* AND *John Knowles*, who were partners, and it appeared that the house, though originally one house, had been divided for the purpose of accommodating the respective families of each partner; it was held that it could only be laid the dwelling-house of *Smith*, that being the house in which the offence was committed, and not the dwelling-house of the partners, although the rent and taxes of both the houses were paid jointly out of the partnership fund. If an ejectment had been brought for these premises on the demise of *Mathew Robinson Boulton*, the lessor could not have recovered, and if so it cannot be well laid to support a burglary. As to THE OTHER POINT, the whole criminality is done away by the consent and assistance which *Mathew Boulton* gave to the perpetration of the offence. It is of the essence of every offence against the property of another that it should be committed against the will of the owner. *Bracton* says

(1) *Ante*, page 687. Case 241.

See the case of Rex *v.* Holden and others, *post*. Lancaster Summer Assizes 1809.

1801.

EGGINTON'S CASE.

"*Contrectatio rei alienæ fraudulenta cum animo furandi invito illo domino cujus res illa fuerit.*" It is taken for granted in *Donally's Case* (1), that robbery must be against the will of the owner; and WILLES, *Justice*, in delivering the opinion of the Judges, says that "Wherever one man obtains property from the possession of another against his will, the law presumes the act to proceed from a felonious intention." The consent of Mr. *Boulton* was the consent of all concerned, and the watchman was the mere instrument of his will. *Boulton*, in any other case than his own, would, under such circumstances, and by a conduct similar to the present, have made himself an accessary before the fact. In *Macdaniel's Case* it is laid down as a principle of law not to be controverted, that whoever procures a felony to be done is a felon; if present he is a principal; if absent an accessary before the fact;" and the statutes of 4 and 5 Philip & Mary, c. 4. and 3 and 4 Will. & Mary, c. 9. are referred to. "The words of the former," says the learned writer, "which are descriptive of the offence are, *If any person shall maliciously counsel, hire or command*; the latter retains the words *counsel, hire or command*, and adds others, shall *comfort, aid, abet or assist;*" and *Sir Edward Coke* says that under the word *aid* is comprehended all persons *assenting and consenting* to the act. Now in the present case *Mathew Boulton* did assent and consent to the whole of this transaction; and if his crime be done away by the circumstance of the property being his own, the same circumstance will do away the crime in the prisoners also. Suppose *Phillips* the watchman had been indicted for the burglary, what could have prevented his being convicted of the crime but the assent of the prosecutor? Now that assent extends to all persons concerned, and will operate to excuse the prisoners in the same way as it would have excused him: for it is clear from *Cornwall's Case* (2), that if he had had the assent of his master to let in the prisoners he would not have been involved in the burglary. *Cornwall* was a servant in the house where the robbery was committed, and in the night-time opened the street-door, and let in the other prisoner, and shewed him the sideboard, from whence the other prisoner took the

Bract. Lib. iii. tr. 2. c. 82. fo. 150.

(1) *Ante*, page 193. Case 97.; but more fully stated 2 East, 715. with the opinion of the Judges *seriatim*.

Foster's C. L. 125.

2 Inst. 182.

(2) 2 Stra. 88. 10 St. Tr. 433. Hargrave's edit.

1801. plate; and upon a special verdict it was held to be burglary in both (1). There is no difference in the cases excepting the consent of the owner of the property.

EGGINTON'S CASE.

(1) See 1 Hale, 553. 2 Hawk. c. 38. s. 8 & 9.

LORD KENYON, *Chief Justice.*—In *Cornwall's* case the servant acted with a felonious intention against his master's property, but in the present case the watchman was in the faithful discharge of his duty to his master.

CLIFFORD. The felonious intent cannot make any difference. In the case *Macdaniel, Berry and Egan* (2), all the prisoners were acquitted on account of the robbery having been committed in consequence of a previous agreement. *Salmon* and others, together with one *Thomas Blee*, met at the *Bell Inn*, in *Holborn*, and agreed that *Blee* should procure two persons to commit a robbery upon *Salmon*. *Blee* did procure *Ellis* and *Kelly*, and led them, unknowingly and on pretence of stealing linen at *Deptford*, to the spot where *Salmon* had been previously placed, and they robbed him of the goods stated in the indictment; and the JUDGES were of opinion that, as he had *consented to part with his property*, no robbery, in consideration of law, was committed on him; for that his property was not taken from him *against his will*. In the case of *Rex* v. *Norden* (3), indeed, the assent of the party robbed was held not to take away the felony; but the reason assigned for that is, that he was quite uncertain whether the robber would come or not; that there was no concert, no sort of connection between him and the highwayman; nothing to remove or lessen the difficulty or danger he might be exposed to in the adventure. But in the present case the offence possibly could not have been perpetrated if it had not been for the communication that was held with, and the assistance afforded to, the prisoners.

(2) Foster, 121. 4 Bl. Com. 230.

(3) Foster's C. L. 128.

MANLEY, *for the Crown.*—As to the burglary, it is not necessary that there should be an open communication between the part which is broken and the rest of the house. If it be parcel of the house, and under the same roof, it is all that the law requires. The counting-house was part of *M. R. Boulton's* dwelling-house, and its being used by the partners for the general purposes of the business is not such a separa-

1801.

EGGINTON'S CASE.

tion of it as to make them distinct and different premises. This is clearly established by the case of *Gibson*, *Mutton* and *Wiggs*. If one partner in a banking-house inhabit the upper part of the house, and the shop below be burglariously broken, it may be laid to be the dwelling-house of the resident partner: The case of *Martha Jones* (1) is very distinguishable from the present; for there the two houses which had formerly been one, were at the time perfectly distinct, and separated from each other, and no communication whatever without going out into the street.—As to the other objection, the essential ingredient in all felonies is *the intention* with which the act is done. In the definition of theft stated on the other side from *Bracton*, a material part of it has been omitted. That writer, after saying that theft must be *cum animo furandi*, adds, *cum animo dico, quia sine animo furandi non committitur*. It is therefore falsely assumed that *Mathew Boulton* stood in a similar situation with *Salmon*, for he cannot, in any view of his conduct, be considered *particeps criminis*, inasmuch as his consent was only given for the purpose of detecting the prisoners, and the only business to which that consent applied was that which the prisoners themselves had originally contrived and proposed to *Phillips* to join in executing. Neither the prosecutor nor the watchman did any act to invite or induce the prisoners to commit the offence. *Norden's Case* is, in principle, very like the present. Having been informed that one of the early stage-coaches was intended to be robbed, he put some money and a pistol in his pocket, and accompanied the coach in a chaise with a view to apprehend the robber. On the attack being made he gave the highwayman the money he had about him, and then jumped out of the chaise with his pistol in his hand and secured him; and it was held to be robbery, for that *Norden* had set out with a laudable intention to use his endeavours for apprehending the highwayman, in case he should that morning come to rob the coach, which, at that time, was uncertain. There is another case of the like kind. A *hop-dealer* was suspected of having robbed an inn at *Worcester*, the landlord, with a view to detect him, hung up a great-coat in

Ante, page 357. Case 174.

(1) *Ante*, page 537. Case 241.

Foster's Crown Law, 128.

1801.

BIGGINTON'S CASE.

the yard, with a handkerchief hanging partly out of the pocket, and the man, being watched, was detected in the very act of stealing the handkerchief. On his trial before MR. BARON THOMPSON at the ensuing *Worcester* Assizes, I took the objection that the landlord had voluntarily suffered the property to be taken, and by this contrivance had induced the prisoner to commit the offence, but the objection was over-ruled and the prisoner convicted. There is a case in *Fitzherbert* which is precisely in point. The servant of an alderman of *London* agreed with strangers to steal his master's plate, and procured a false key of the place where the plate was kept in the house; but the servant afterwards revealed the design to his master, who, on the appointed night, had men ready to apprehend them; the strangers afterwards came and entered into the said place with intent to steal the plate and were taken, and being tried for the burglary they were found guilty and executed.

Fitz. Justice, p. 31. b. Cromp. Edit. pl. 10.

THE JUDGES were unanimously of opinion that the prisoners were not guilty of the *burglary*, inasmuch as the centre building, which they had entered and robbed, being a place for carrying on a variety of trades, and having no internal communication with the adjoining houses, could not be considered as part of any dwelling-house; BUT A MAJORITY held that the prisoners were guilty of the *larceny*; for that although *Mathew Boulton* had permitted or suffered the meditated offence to be committed, he had not done any thing originally to induce it; that his object being to detect the prisoners, he only gave them a greater facility to commit the larceny than they otherwise might have had; and that this could no more be considered as an assent than if a man, knowing of the intent of thieves to break into his house, were not to secure it with the usual number of bolts; that there was no distinguishing between the degrees of facility a thief might have given to him; that *Boulton* never meant that the prisoners should take away his property; that the design originated with the prisoners; and that all *Boulton* did was to prevent their design being carried into undetected execution; which differed

See S. C. 2 East's C. L. 667, 668.

the case greatly from what it might have been if he had employed his servant to suggest the perpetration of the offence originally to the prisoners (*a*). 1801.

EGGINTON'S CASE.

THE prisoners were therefore pardoned, on condition of being transported for seven years.

(*a*) MR. JUSTICE LAWRANCE doubted whether it could be said to be done *invito domino*, when the owner had directed his servant to carry on the business, and meant that the prisoners should be encouraged by the presence of that servant: and that by his assistance they should take the goods, so as to make a complete felony; though he did not mean that they should carry them away. 2 East's C. L. 668.

THE KING *against* ROBERT MARTIN.

CASE CCCXXVI.

A conviction on 15 Geo. II. c. 28. for two utterings on *the same day*, will warrant judgment of a year's imprisonment, though the indictment charge the first uttering on 14th February, and that on *the said 14th February* he uttered, &c. for being a *material averment*, it shall be taken to have proved that both utterings were on the *same day*.

S. C. 1 East, Ad. xviii.

AT the Lent Assizes for the county of *Derby*, in the year 1801, *Robert Martin* was indicted and tried before MR. BARON GRAHAM, upon the statute 15 Geo. II. c. 28. for uttering false and counterfeited coins to different persons on the same day.

THE first count charged, That he *Robert Martin*, on the fourteenth of February, in the forty-first year of the King, one piece of false and counterfeit money, made to the likeness and similitude of a shilling, as and for the current money of the realm, did utter to one *William Coxen*, he then and there well knowing the same to be false and counterfeit; and that he the said *Robert Martin*, on the *said fourteenth day of February* one other piece of false and counterfeit money, made to the likeness and similitude of a shilling, as and for the current money of the realm, did utter to one *John Longden*, he well knowing the same to be false and counterfeit, against the form of the statute in such case made, &c.— There was a second count for the single utterance to *William Coxen*.

THE Jury found the prisoner guilty on both the counts, of having knowingly uttered the two bad shillings on the fourteenth day of February.

1801.

MARTIN'S CASE.

THE statute 15 Geo. II. c. 28. s. 3. enacts, "That if any person shall knowingly utter or tender in payment any false money, and shall, either on *the same day*, or within ten days then next after, knowingly utter or tender in payment any more or other false money, &c. he shall be deemed a common utterer, and suffer a year's imprisonment;" the statute having by the second section made a single uttering punishable with six months' imprisonment only.

THE COUNSEL *for the prisoner* moved in arrest of judgment, to avoid the *increased punishment of a year's imprisonment*, that the charge in the first count for the second uttering was not correctly stated, it being laid "*on the said fourteenth day of February*," instead of pursuing the words of the statute, and laying it to have been "*on the same day*," for that as evidence of an utterance at any time before the indictment found would support the first part of the charge, it did not appear upon the face of the indictment that the utterings were both *on the same day*.

THE case on this objection was reserved for the opinion of the JUDGES, Whether upon the evidence given, the charge upon the second utterance was well laid in the first count?

THE JUDGES considered of this case from time to time until the month of June 1801, when they decided that the indictment was good, for that, on the face of it, it clearly appeared that the two utterings were charged to have been on *the same day*; for the averment of "the same day" being a material averment, and the rule being that all material averments must be strictly proved, it must be taken that, in this case, it was proved that the prisoner uttered two different shillings to different persons on two different times of the same day.

1801.

THE KING *against* MICHAEL HYMAN.

CASE CCCXXVII.

In an indictment for *felony* against a receiver of stolen goods, it is sufficient to state that the principal was "tried and duly *convicted*," without going on to shew that *judgment* was passed upon him, or how he was delivered.

2 East, 782.

AT the Lent Assizes for the county of *Surry* 1801, *Michael Hyman* was tried before MR. JUSTICE HEATH on the statute of 3 Will. & Mary, c. 9. s. 4. and 4 Geo. I. c. 11. for receiving stolen goods knowing them to have been stolen.

THE indictment stated, That at the Old Bailey, on Wednesday, 18th February 1801, *James Barnes* the younger, according to due course of law by a Jury of the country duly taken, &c. was tried and duly *convicted* upon an indictment, &c. for that he, together with *John Gillet*, on the 3d February 1801, about the hour of twelve of the night of the same day, &c. the dwelling-house of *William Kern* feloniously and burglariously did break and enter, &c. (stating a burglary and larceny of large quantities of various articles of linen-drapery), "as by the record thereof remaining filed in the said Court of Gaol Delivery may more fully and at large appear;" AND THAT *Michael Hyman*, late of, &c. &c. after the said felony and burglary was done and committed in manner and form aforesaid, to wit, on 9th February 1801, at, &c. (stating sundry articles of linen-drapery), being part and parcel of the goods and chattels above-mentioned so as aforesaid feloniously and burglariously stolen, taken, and carried away, feloniously did receive and have, he the said *Michael Hyman* well knowing the same to have been feloniously stolen, taken, and carried away, against the statute and against the peace.

THE charge was proved by very full and satisfactory evidence, and the Jury found the prisoner guilty:

SILVESTER, *Common Serjeant*, MARRYAT, and GURNEY, moved, in arrest of judgment, that the indictment was defective, inasmuch as it did not shew whether any or what *judgment* had followed upon the *conviction* of the principal, which they contended it ought to have done, because if the judgment against a principal be arrested, or the principal die before judgment is pronounced against him, the accessary

1801. cannot be tried for the felony: and they referred to *Lord Sanchar's Case*, 9 *Co.* 117 (*a*).

HYMAN'S CASE.

MR. SERJEANT BEST, *for the Crown*, contended, that although by the common law wherever the attainder of the principal was prevented by his death, by standing mute, by challenging above the allowed number of jurors, or by pardon, whether before or after conviction, the accessary could not be arraigned, it was now clear, from the statute 1 Ann. st. 2. c. 9, that the *conviction* of the principal is all that the law requires to warrant an indictment against the accessary, and that therefore it is not necessary to allege in the indictment whether any or what *judgment* was passed on the principal; for that statute recites the mischief to be, that as the law then was no accessary could be convicted or suffer punishment where the principal was not *attainted*, or had the benefit of his clergy, and, for remedy thereof, it enacts, "That if any principal offender shall be *convicted* of any felony, or shall stand mute, or peremptorily challenge above the number of twenty persons returned to serve on the Jury, it shall and may be lawful to proceed against any accessary either before or after the fact, in the same manner as if such principal felon had been *attainted* thereof, notwithstanding any such principal felon

(*a*) See also 4 Co. 43. b. where it is said, "It was resolved *per totam curiam*, that if principal and accessary are indicted, and the principal is pardoned, or has his clergy, the accessary cannot be arraigned: for the maxim of the law is *ubi factum nullum, ibi fortia nulla; et ubi non est principalis, non potest esse accessorius*. Then before it appears that there is a principal, one cannot be charged as accessary; but none can be called principal before he is so proved and *adjudged* by the law, and that ought to be by JUDGMENT upon verdict, or confession, or by outlawry; for it is not sufficient that *in rei veritate* there was a principal, unless it so appears by *judgment of the law*, and that is the reason when the principal is pardoned, or takes his clergy before judgment, that the accessary shall never be arraigned, for it does not appear, by *judgment of law*, that he was principal; and the acceptance of the pardon, or praying of the clergy, is an *argument*, but no *judgment in law*, that he is guilty; but if the principal after *attainder* is pardoned, or has his clergy allowed, there the accessary shall be arraigned, because it appears judicially that he was principal."

shall be admitted to the benefit of his clergy, pardoned, or *otherwise delivered* before attainder, and every such accessary shall suffer the same punishment, if he or she be *convicted*, or shall stand mute, or peremptorily challenge above the number of twenty persons returned to serve on the Jury, as he or she should have suffered if the principal had been *attainted*." The mischief was the not being able to try the accessary until the principal was *attainted*, to remedy which the statute directs that the accessary shall be tried for the felony if the principal be *convicted*, notwithstanding he shall be afterwards *any ways delivered* before his *attainder*. The second clause also of the statute, for the same reason, pursues the same language: for, AFTER RECITING that buyers and receivers of stolen goods conveyed away and concealed the principal felons so that they could not be convicted, IT ENACTS that such receivers may be prosecuted as for *a misdemeanor*, although the principal felon be not before *convicted*, which shall exempt the offender from being punished for the felony if the principal shall be afterwards *convicted*; which shews that the *conviction* of the principal is all that the law requires on which to found an inquiry against the accessary (*a*). And upon reference to MR. KNAPP, the Clerk of the Arraigns, it appeared that in all the precedents upon this subject the indictments only stated the *conviction* and not *the attainder* of the principal.

THE LEARNED JUDGE was of opinion that the statute 1 Ann. c. 9. and the constant course of the precedents since

(*a*) See also the statute 22 Geo. III. c. 58. s. 1. which renders buyers and receivers of stolen goods liable to be prosecuted for *a misdemeanor*, (except where the person actually committing the felony shall have been already *convicted* of grand larceny, or of some greater offence,) although the principal felon be not before *convicted* of the said felony, and whether he be amenable to justice or not: and therefore under this statute the principal, though not convicted or pardoned, may be examined as a witness against the accessary, as was done in Patram's Case, at the *Bridgewater* Summer Assizes, before MR. JUSTICE GROSE: in Haslam's Case at the Old Bailey in 1786, *ante*, page 418. Case 194; and in Jonathan Wild's Case on the statute 4 Geo. I. c. 11. for taking a reward to help to stolen goods, *ante*, page 17, *notis*.

1801.

HYMAN'S CASE.

that time, were sufficient answers to the objection, which he admitted must have had great weight if the matter had remained as it was at common law; but as the words of the statute, "*or otherwise delivered*," might bear a different interpretation to that which his mind led him to give them, he thought it right, in favour of a prisoner, to save the point for the consideration of the JUDGES.

LORD KENYON, *Chief Justice*, at the ensuing Summer Assizes at *Croydon*, delivered the opinion of all the JUDGES that the indictment was good, on the authority of a number of precedents, at the Old Bailey and on the Home Circuit, where the same form of indictment had been usually pursued, and on a consideration of the statute of the 1 Ann. st. ii. c. 9. s. 1 and 2.

THE prisoner was accordingly transported for fourteen years (*a*).

(*a*) At the Summer Assizes at Monmouth in 1812, *John Baldwin* was tried before MR. BARON THOMPSON for knowingly receiving stolen goods. The indictment stated that the goods had been stolen by *Isaac Powell*, and that he had been *duly convicted* of this felony at the Great Session for *Brecon*. An examined copy of the Record of *Powell*'s conviction was produced, which stated that the Jury do say, "that the said "*Isaac Powell* is guilty of the felony whereof he stands indicted, and find "the value of the several goods and chattels so feloniously stolen, taken, "and carried away, to amount to the value of 40*s*. and the said *Isaac* "*Powell* in mercy, &c." It was objected that this entry was not sufficiently formal and correct to support the averment that *Powell* had been *duly convicted*. But THE COURT held that the *judgment* was not necessary, and might be rejected; that the *conviction* was sufficient; that in the common case, where the receiver is tried with the thief, there is no judgment on the thief before the verdict against the receiver; and that although this record was full of errors, yet an erroneous attainder of the principal is sufficient as against the accessary until it is reversed. 3 Campb. Rep. 265.

1801.

THE KING *against.* JOHN HARRIS.

CASE CCCXXVIII.

Wilfully shooting at another in a man's own house is an offence within 9 Geo. I. c. 22.

It is no objection to the legality of a writ of *Hab. fac. poss.* that the names of the officers to whom it is directed were inserted by interlineation after the writ was sealed, and while it remained in the hands of the Under Sheriff.

1 East, Add. xviii.

AT the Lent Assizes for the county of *Salop* 1801, *John Harris* was tried before MR. JUSTICE ROOKE on the Black Act, 9 Geo. I. c. 22. (*a*) for wilfully shooting at *Thomas Banks*, a bailiff, while he was endeavouring to execute an *Habere facias possessionem.*

IT appeared in evidence that the writ was directed to three persons who were bailiffs to the Sheriff of *Salop*; and that after it was sealed, but before it was sent out of the office, an interlineation was inserted by the Under Sheriff in these words—" and to *Jeremiah Powell* and *Thomas Banks*, my bailiffs on this occasion only;" that the said *Powell* and *Banks* went with this writ to the house of the prisoner and desired admittance; that the prisoner looked out of his window, and the warrant was shewed to him, but instead of complying with their request, he declared that he would blow out the brains of the first man who should attempt to enter his house; that *Banks*, upon hearing this threat, went away to procure further assistance, and soon afterwards returned with another man, when they all together burst open the door of the prisoner's house; on which the prisoner fired a blunderbuss at them and wounded *Banks* in the knee. The Jury found the prisoner guilty.

CLIFFORD, *for the prisoner*, contended that the names of

(*a*) And see 43 Geo. III. c. 58. by which it is enacted that if any person or persons shall wilfully, maliciously and unlawfully shoot at or present, point, or level any kind of loaded fire-arms at any of his Majesty's subjects, and attempt by drawing a trigger, or in any other manner to discharge the same at or against his or their person or persons, or shall wilfully, maliciously and unlawfully stab or cut any of his Majesty's subjects with intent to murder or rob, or to maim, disfigure, or disable such subject or subjects, or to do them some other grievous bodily harm, or to obstruct, resist, or prevent the lawful apprehension and detainer of the person or persons so stabbing or cutting, he or his accomplices shall be guilty of felony without clergy, provided it appear that if death had ensued the homicide would have been murder.

1801.

HARRIS'S CASE.

Banks and *Powell* having been inserted in the warrant after the seal had been affixed to it, they had no legal authority to execute it; and, SECONDLY, that a person shooting *in his own house* at another person was not an offence within the meaning of the statute 9 Geo. I. c. 22. which enacts that "if any person or persons shall wilfully and maliciously shoot at any person *in* any dwelling-house *or other place*, every person so offending shall be guilty of felony, &c.;" and on these objections the case was reserved for the opinion of the Judges.

THE JUDGES held the conviction right.

CASE CCCXXIX.

THE KING *against* JOHN MARGETTS AND OTHERS.

If a burglary be committed in the warehouse of a trading company, in the house belonging to which *an agent* of the company resides with his family, for the purpose of carrying on the business, it may be laid to be the *dwelling-house of the agent*, although the rent thereof is paid, and the lease is held by the company.

AT the Old Bailey in May Session 1801, *John Margetts*, and two other persons, were indicted before MR. BARON GRAHAM, present MR. JUSTICE GROSE, for burglariously breaking and entering the dwelling-house of *John Sylvester*, on the night of the 7th May, with intent to steal, and stealing a quantity of blankets his property.

THE prosecutor, *Mr. Sylvester*, kept a blanket warehouse at No. 9, *Goswell Street*, and resided together with his wife and seven children in the house over the warehouse. The warehouse was on the ground-floor, and consisted of four rooms, the second of which was the room that was broken into, and there was an internal door from the warehouse to the dwelling-house. All the blankets were the property of *Mr. William Sellman* and others, a company of blanket manufacturers, consisting of sixty or more at *Whitney* in *Oxfordshire*, none of whom ever slept in the house. The whole rent of both dwelling-house and warehouse was paid for by the company at *Whitney*; to whom *Sylvester* acted as servant or agent, and received a consideration for his services from them, part of which consideration he said was his being permitted to live in the house rent free, and the lease of the premises was in the company. The commission of the offence was proved by very clear and satisfactory evidence.

1801.

MARGETTS'S CASE.

ALLEY and GLEED *for the prisoners*, contended on the authority of the *case of Ann Hawkins* (1), that this must be considered the dwelling-house of the company, and ought to have been so charged in the indictment, and not the house of *Sylvester* who inhabited it merely for them, and as their servant.

(1) Foster, 38, 39. See also 2 East's P. C. 500, 501.

THE COURT was clearly of opinion that it was rightly charged to be the dwelling-house of *Sylvester*: for although the lease of the house was held, and the whole rent reserved paid by the company in the country, yet as they had never used it in any way as their habitation, it would be doing an equal violence to language and to common sense, to consider it as their dwelling-house, especially as it was evident that the only purpose in holding it was to furnish a dwelling to their agent, and ware-rooms for the commodities therein deposited. It is the mean by which they in part remunerated *Sylvester* for his agency, and is precisely the same thing as if they had paid him as much more as the rent would amount to, and he had paid the rent. The bargain however takes another shape. The company prefer paying the rent of the whole premises, and giving their agent and his family a dwelling therein, towards the salary which he was to receive from them. It is therefore essentially and truly the dwelling-house of the person who occupies it. The punishment of burglary was intended to protect the actual occupant from the terror of disturbance during the hours of darkness and repose, but it would be absurd to suppose that that terror, which is of the essence of this crime, could, from the breaking and entering in this case, have produced an effect at *Whitney* in *Oxfordshire*. If however any doubt should occur upon the reconsideration of this subject, the prisoners shall have the benefit of it, and the case shall be put into a state of further adjudication (*a*).

See the Case of Rex *v.* Stock and Edwards, Summer Assizes, Carlisle, 1809.

THE prisoners were found guilty of the whole charge.

(*a*) MR. JUSTICE GROSE asked whether there had not been a prosecution at the Old Bailey of a burglary, in some of the halls of the City of *London*, in which it was clear that no part of the corporation resided, but in which the Clerks of the Company generally lived: and MR. KNAPP

1801.

MARGETT'S CASE.

informed the court that his father was clerk to the Haberdashers' Company, and resided in the hall, which was broken open, and in that case the court held it to be his father's house.

CASE CCCXXX.

An indictment on the statute 39 Geo. III. c. 85. must contain all the requisites of an indictment for larceny at Common Law.

S. C. 2 East, 576.

S. C. 3 Bosanquet and Puller, New Rep. 106.

THE KING *against* JOHN MC. GREGOR.

AT the Old Bailey in September Session 1801, *John Mc. Gregor* was tried before JOHN SILVESTER, ESQ. *Common Serjeant*, on the statute 39 Geo. III. c. 85 (*a*), which, after RECITING, "That bankers, merchants and others are in the course of their dealings and transactions, frequently obliged to intrust their servants, clerks, and persons employed by them in the like capacity, with receiving, paying, negotiating, exchanging and transferring money, goods, bonds, bills, notes, bankers' drafts, and other valuable effects and securities; and that *doubts had been entertained* whether the embezzling of the same by such servants, clerks and others so employed by their masters amounts to felony by the law of *England*; and that it is expedient that such offences should be punished in the same manner in both parts of the United Kingdom," IT ENACTS, "That if any servant or clerk, or any person employed for the purpose in the capacity of a servant or clerk to any person or persons whomsoever, or to any body corporate or politic, shall, by virtue of such employment, receive or take into his possession any money, goods, bond, bill, note, banker's draft, or other valuable security or effects, for or in the name or on the account of his master or masters, or employer or employers, and shall fraudulently embezzle, secrete, or make away with the same or any part thereof, every such offender shall be deemed to have feloniously stolen the

(*a*) See the statute 52 Geo. III. c. 63, that if any person with whom (as banker, merchant, broker, attorney, or agent of any description whatsoever,) any ordnance debenture, exchequer bill, navy, victualling or transport bill, or other bill, warrant or order for the payment of money, &c. &c. &c. shall have been deposited for safe custody, or special purpose, without any authority to sell or pledge the same, shall embezzle, secrete or apply the same to his own use, in violation of good faith, and contrary to the special purpose for which they were so deposited, he shall be deemed guilty of a misdemeanor. REX *v.* Walsh, Old Bailey January Session 1812, at the end of the Case where this statute is more fully set forth.

same from his master or masters, employer or employers, for whose use or in whose name or names, or on whose account the same was or were delivered to or taken into the possession of such servant, clerk or other person so employed, although such money, &c. or other valuable security, was or were no otherwise received into the possession of such master or masters, employer or employers, than by the actual possession of his or their servant, clerk, or other person so employed: and every such offender, his adviser, procurer, aider or abettor, being thereof lawfully convicted or attainted, shall be liable to be transported (*a*), for any term not exceeding fourteen years."

THE indictment charged "that *John Mc. Gregor*, after 12 July 1799, to wit, on &c. at &c. (he the said *John Mc. Gregor*, then and there being a clerk to *George Shum*, *William Curtis*, *Costin Rhodes*, *&c.* and employed by them in the capacity of such clerk,) did, by virtue of such his employment, receive and take into his possession the sum of three hundred pounds, for and on account of the said *George Shum*, *&c.* the said masters and employers of the said *John Mc. Gregor*; and that he the said *John Mc. Gregor* afterwards, to wit, on, &c. at, &c. with force and arms fraudulently and feloniously did embezzle and secrete the said three hundred pounds, against the form of the statute in such case made and provided: and so the said *John Mc. Gregor* then and there, to wit, on, &c. at, &c. with force and arms feloniously *did steal, take, and carry away* the said three hundred pounds from the said masters and employers of him the said *John Mc. Gregor*, on whose account the said three hundred pounds was so taken into the possession of him the said *John Mc. Gregor*, being such clerk so employed as aforesaid against the form of the statute, &c."

(*a*) At Winton Spring Assizes 1800, one Jones was convicted before MR. SERJEANT PALMER, for a larceny at Common Law, in stealing wearing apparel from his master, and it was contended that under the above clause the Court must pass judgment of transportation; but on consulting MR. JUSTICE LAWRANCE the other Judge on the circuit, they were both of opinion, that in order to found a judgment on the 39 Geo. III. c. 85. the indictment must be specially drawn, so as to bring the case within it. 2 East, P. C. 576.

1801.

M'GREGOR'S CASE.

It appeared in evidence, that the prisoner was accountant clerk to the Board of Directors of the Pelican Life Insurance Office, who had the management, by different committees, of all the concerns of the Society; that it was the particular duty of the prisoner to receive the monies paid at the office for renewal premiums, and endowment premiums, and to pay the amount weekly into the hands of *Robarts and Co.* bankers to the Society; that the prisoner, on 17th July 1801, delivered into the committee an account in his own hand-writing, of his receipts and payments, from the 10th to the 17th July as follows:

Dr.				July 14	Cr.		
To Renewal Premiums	£602	10	11	By *Robarts and Co.*	£381	15	7
To Endowment Premium	23	0	0	July 15th By Do.	140	17	4
				July 17th By Do.	102	18	0
	£625	10	11		£625	10	11

which account was compared with sums stated to have been received in the renewal book, and endowment book, and with the sums stated in the bankers' book to have been paid into the bankers', and being found to correspond, the account was signed by the audit committee, and passed in the usual way; but it further appeared by the evidence of *Messrs. Robarts and Co.* cashiers, and other witnesses, that a sum of only £81 15 7, instead of a sum of £381 15 7, had been paid in by the prisoner on the 14th July, and that between that day and the 17th July, a figure had been prefixed by somebody to the entry of the £81 15 7, and erased between that day and the 23d July, when the prisoner was dismissed.

The prisoner was found Guilty.

Knowlys, Knapp, and Alley *for the prisoner*, in arrest of judgment, objected that the offence for which he was indicted was *a larceny*, in the commission of which offence the rules of the Common Law required, that the property should be taken from *the possession* of the master, but that the Legislature in having dispensed with this rule, under the circumstances described in the 39 Geo. III. c. 85. had not thereby

altered the nature or denomination of the offence, and therefore in this, as in all other cases of *larceny*, the indictment should have expressly averred, that the said three hundred pounds were "the proper monies of his masters the said *George Shum, &c.* (*a*)." 1801. M'GREGOR'S CASE.

ON this objection the case was saved for the opinion of THE TWELVE JUDGES, and, in Hilary Term 1802, was argued in the Exchequer Chamber, before ten of the Judges, by KNOWLYS for the prisoner, and by SERJEANT BEST for the Crown. Lord Kenyon, C. J. and Heath J. absent.

KNOWLYS *for the prisoner.* This indictment cannot be supported; for the crime, which is larceny, is not averred upon the record, with sufficient certainty. The money alleged to have been feloniously stolen by the prisoner, is not expressly averred to be the money of any person. The statute 39 Geo. III. c. 85. upon which this indictment is founded, does not create *a new felony*; it does not mean to make embezzling *eo nomine* a substantive offence: for whenever a statute raises any fact into a felony *eo nomine*, it is always expressly enacted, that such fact shall be felony, or that the offender shall be deemed a felon, as in the Coventry Act 22 & 23 Car. II. c. 1. s. 7.; the Black Act 9 Geo. I. c. 22.; and the 7 Geo. II. c. 21. for an assault with intent to rob; but the 39 Geo. III. c. 85. does not declare either that the embezzling shall be deemed felony, or the offender be adjudged a felon, but only refers the facts to a class of felonies, the properties of which are well known to the Common Law, under the description of larceny. It merely places property received by a servant on account of his master, in the *legal possession* of the master, so as to refer the offence of converting it to that species of offence which is denominated *larceny* by the Common Law, to which alone the words of the preamble can refer. The words of the statute are, that whoever commits the described offence, by embezzling his master's money or goods, "*shall be deemed to have feloniously stolen the same*," and the words "*feloniously stolen*," have been uniformly used by the Legislature, to describe the crime

(*a*) See Long's Case, Cro. Eliz. 490. 2 Hawk. c. 25. s. 71. Dyer, 99. Rex v. Walker, 3 Campb. Rep. 264.

1801.

M'GREGOR'S CASE.

of larceny; as appears from 1 Edw. VI. c. 12. s. 10. the 3 Edw. VI. c. 3. the 8 Eliz. c. 4. the 22 Car. II. c. 5. s. 3. the 3 Will. & Mary, c. 9. s. 1. the 10 and 11 Will. III. c. 23. s. 1. the 12 Ann. c. 7. and the 24 Geo. II. c. 45. against stealing particular goods, or taking them under certain circumstances; for all of them pursue the same form, as to the requisite parts of larceny at Common Law. If then the felony created by this statute be not an embezzlement, or a felonious stealing *eo nomine*, but a larceny, every indictment upon the statute ought to contain, on the face of it, a good charge of larceny against the person accused. It must not only allege the felonious taking and carrying away of the thing stated to have been stolen, but it must also allege that thing to be *the property of another person*; for the very definition of larceny is, "the felonious taking and carrying away of the personal property *of another*." It is of the substance of the crime of larceny, that the thing stolen should be *res aliena*. If the proprietor be known, the indictment must aver the thing stolen to be the money, goods, or chattels of that person *eo nomine*, and charge them to have been feloniously taken from his possession. If the proprietor be unknown, it must describe it to be the property of a person, or of persons unknown. If an indictment for robbery were, in the usual course, to charge the prisoner with having taken money or goods feloniously and violently from the person of the prosecutor, and were to stop there, it would be a bad indictment; for it ought to proceed, and charge that the said monies or goods were *the property* of the said A. B. (*a*): and it is laid down by *Hawkins* (1), that the want of a direct allegation of any thing material, in the description of the substance, nature, or manner of the crime, cannot be supplied by any intendment or implication whatsoever.

(1) 2 Hawk. c. 25. s. 60.

MR. SERJEANT BEST *for the Crown*. This is an indictment on a statute, which makes the embezzling by servants,

(*a*) So also it is held, that an indictment for stealing a piece of linen cloth of one I. S. without adding *de bonis et cattellis cujusdam* I. S. is insufficient, because it doth not expressly appear to whom the goods stolen did belong. Hawk. Bk. 2. Ch. 25. Sect. 60.

1801.

M'GREGOR'S CASE.

in the manner therein stated, *a substantive felony*, which before was only a misdemeanor, or breach of trust, for which the master had a civil remedy; and where a *particular offence* is created by a statute, it is sufficient to follow the words of the statute in describing the offence. Now the indictment in the present case states all those circumstances attending the transaction, which under the provisions of the Act constitute the offence. In an indictment for a larceny at Common Law, the property taken must certainly be averred to be the property of the owner, if he be known; but there is a great difference between a larceny at Common Law, and the offence created by this statute, which is *a new offence*, and therefore is not in any way like to, or to be compared with those indictments, on statutes which merely oust the offender of clergy, in cases which were before larcenies at Common Law; for in such case the offence remains a larceny, and must be treated as such in the indictment. But in the present case the offence created by the 39 Geo. III. c. 85. was not a larceny at Common Law. The Legislature considering that the circumstances which are now made to constitute this offence, did not amount to larceny, have in terms described the particular circumstances which should for the future be punished, not as a larceny, but as a new felony, with transportation, not exceeding fourteen years. It has created a new offence, and not adapted a new punishment to an old offence, for if this had been considered as larceny before the statute, this enactment would have been unnecessary. The species of property intended to be protected by this statute, is that which is *in transitu* at the time the offence is committed, and the real proprietor of it difficult to be ascertained; and the Legislature therefore meant to relieve the prosecutor from the necessity of laying it to be in any particular person. But at any rate no technical form is required, in charging the thing stolen to be the property of another, and this indictment states that the prisoner "took and carried away these three hundred pounds *from his said masters, on whose account the said money was so received by him.*" This sufficiently shews that it was not the prisoner's own property, which is the same thing

1801.

M'GREGOR'S CASE.

as if it had alleged the said money to be their property, for it clearly shews that they had the special property in it.

MR. BARON THOMPSON in April Session 1802, delivered the opinion of the Judges to the following effect. The objection in this case, on the part of the prisoner, was, that as the statute 39 Geo. III. c. 85. has not made the species of embezzlement therein mentioned *eo nomine*, a distinct and substantive felony, but had only enacted, that the property received into the possession of the servant, and feloniously converted by him, shall be considered as having been, by such conversion, feloniously taken from the possession of the master, the offence still continues a Common Law larceny, and consequently, that an indictment framed upon this statute, must contain all the requisites of an indictment for larceny at Common Law. And as, in the present indictment, the money alleged to have been stolen, is not expressly averred to have been the money of any person whatever, a majority of the Judges are of opinion, that the objection is well founded, and consequently that the judgment in this case must be arrested (*a*).

(*a*) The Judges it appears entertained at first great doubts upon the case, which stood over for further consideration, and a difference of opinion for some time prevailed, but on the 25th February 1802, all the Judges except Lord Kenyon, C. J. and Rooke J. met at Mr. Justice Heath's, when they were of opinion that the indictment was bad, in not alleging the money to be the money of the prosecutors; that the statute made the offence a larceny, and made the possession of the servant under such circumstances, the possession of the masters." 2 East's C. L. 578.

1802.

CASE CCCXXXI.

It is not necessary in an indictment, charging the offence of repeated uttering within ten days, to shew that in the original indictment, the offender was adjudged a common utterer. S. C. 1 East, Add. xix.

THE KING *against* MICHAEL MICHAEL.

AT the Old Bailey in February Session 1802, *Michael Michael* was tried before JOHN SILVESTER, Esq. *Common Serjeant*, on the statute 15 & 16 Geo. II. c. 28. s. 3. which enacts, "That if any person whatsoever shall utter or tender

1802.

MICHAEL'S CASE.

in payment any false or counterfeit money knowing the same to be false or counterfeit, to any person or persons, and shall, either the same day, or *within the space of ten days* then next, utter or tender in payment any more or other false or counterfeit money, knowing the same to be false or counterfeit, to the same person or persons, or to any other person or persons, or shall at the time of such uttering or tendering have about him or her, in his or her custody, one or more piece or pieces of counterfeit money besides what was so uttered or tendered, then such person so uttering or tendering the same, shall be deemed and taken to be A COMMON UTTERER of false money, and being thereof convicted shall suffer *a year's imprisonment*, and shall find sureties for his or her good behaviour for two years more, to be computed from the end of the said year.—And if any person having been once so convicted as A COMMON UTTERER of false money, shall afterwards again utter or tender in payment any false or counterfeit money to any person or persons, knowing the same to be false or counterfeit, then such person, being thereof convicted, shall for such *second offence* be and is hereby adjudged to be guilty *of felony without benefit of clergy*."

THE INDICTMENT charged, That heretofore, *viz.* at the General Quarter Session of the Peace, &c. holden at *Guildford*, &c. on, &c. *viz.* 15th July, 40 Geo. III. before, &c. Justices of our Lord the King, assigned to keep the peace, &c. the defendant, by the name and description of *Michael Michael*, of, &c. was *in due form of law tried and convicted* by a certain Jury of the County duly taken and sworn between our said Lord the King and the said *Michael Michael* in that behalf, on a certain indictment then depending against him the said *Michael Michael*, for that the said *Michael Michael*, on the 10th July, 40 Geo. III. with force and arms, at, &c. one piece of false and counterfeit money, made and counterfeited to the likeness and similitude of a piece of good, lawful, and current money and gold coin of this realm, called a half-guinea, as and for a piece of good, lawful, and current money and gold coin of this realm, called a half guinea, unlawfully, unjustly and deceitfully did utter

1802.

MICHAEL'S CASE.

to one *James Senior*; he the said *Michael Michael*, at the time, when he so uttered the said piece of false and counterfeit money, then and there well knowing the same to be false and counterfeit; and that he the said *Michael Michael*, at the time when he so uttered the said piece of false and counterfeit money as aforesaid, *viz.* on the said 10th July, 40 Geo. III. at, &c. had about him the said *Michael Michael*, in the custody and possession of him the said *Michael Michael*, one other piece of false and counterfeit money, made and counterfeited to the likeness and similitude of a piece of good, lawful, and current money and silver coin of this realm called a half crown; he the said *Michael Michael* then and there well knowing the said last-mentioned piece of false and counterfeit money to be false and counterfeit; in contempt, &c. against the form of the statute, &c. and against the peace, &c. AND THEREUPON IT WAS CONSIDERED AND ADJUDGED by the said Court, that the said *Michael Michael*, for the misdemeanor and offence aforesaid, in the indictment above specified, should be imprisoned in the common gaol of the county aforesaid for the space of one year, and until he found sureties for his good behaviour for two years, to commence from the expiration of the first year: himself to be be bound in forty pounds, and two sureties to be bound in twenty pounds each; as by the record thereof doth more fully appear: And the Jurors further present, &c. that the said *Michael Michael*, late of, &c. labourer, *having been so convicted as a* COMMON UTTERER *of false money*, afterwards, to wit, on the 14th January, at the parish, &c. with force and arms, at, &c. one piece of false and counterfeit money, made and counterfeited to the likeness and similitude of a piece of good, lawful, and current money and gold coin of this realm, called a seven-shilling piece, unlawfully, unjustly, deceitfully, and feloniously, did utter to one *John Lucas*, he the said *Michael Michael*, at the time when he so uttered the said last-mentioned piece of false and counterfeit money, then and there well knowing the same to be false and counterfeit, in contempt, &c. and against the form of the statute, &c. and against the peace, &c. There was A SECOND COUNT,

differing from the first, in charging the prisoner with "having been so convicted as aforesaid," instead of the words "having been convicted as *a common utterer* of false money."

IT was proved by the Clerk to the Solicitor of the Mint, who was present, that the prisoner was the person who had been tried at the *Surry* Sessions: the Keeper of the county gaol of *Surry* also proved that he had taken the prisoner from the gaol to the *Surry* Sessions-House, to be tried, and had, after his conviction, returned with him to the gaol, where he was confined twelve months pursuant to his sentence. The uttering also of a bad seven-shilling piece to *John Lucas* on the 14th January was clearly proved.

THE Jury found the prisoner guilty.

KNAPP, *in arrest of judgment*, contended, that the indictment did not state with sufficient certainty that the prisoner had been before found guilty as *a common utterer*; for it does not appear upon the statement of the former conviction, that he was adjudged to be a common utterer, or that he was found guilty as one. It is not stated in the original indictment, nor in the judgment given on it, that he was a common utterer, and for want of that averment it is bad. And in the present indictment it is only stated that the Court *considered and adjudged* the prisoner to be imprisoned twelve months, and to find security for two years more. It therefore does not appear, except by inference, that he was a common utterer.

THE COURT was of opinion that it was not necessary to state in express terms that he was a common utterer, because that is a conclusion of law resulting from the facts of the case. The record states that he was tried for uttering; and at the time of so uttering he had one other piece of counterfeit money, and that "thereupon it was considered and adjudged by the said Court." What was considered? Why, all these facts; and then the conclusion of law is, that he is a common utterer, and he is adjudged to suffer the punishment inflicted by the statute on a common utterer.

THE point, however, was saved for the opinion of the

1802.

MICHAEL'S CASE.

Judges, on the following statement of it: "That in stating the original record and judgment of the Court of Quarter Session, it is not stated that the Court did adjudge the defendant to be a common utterer, but only that they considered and adjudged the prisoner to be imprisoned twelve months, and to find surety for his good behaviour for two years more.

MR. JUSTICE GROSE, in June Session following, after stating the case, delivered the opinion of the JUDGES. The objection to this record is, that in stating the original record and the judgment of the Court of Quarter Session at *Guildford*, it is not stated that the Court did *adjudge* the prisoner to be *a common utterer*, but only that he "be imprisoned twelve "months, and find sureties for his good behaviour for two years "more." The indictment is founded on 15 Geo. II. c. 28. which states, "That if any person shall knowingly utter any counterfeit money, and at the time of so uttering shall have any more counterfeit money in his possession, he shall be deemed *a common utterer* of false money, and on conviction shall suffer a year's imprisonment, and find sureties for his good behaviour for two years more." The present record states that the prisoner was *convicted* of, and adjudged to suffer the punishment prescribed for this offence, which is all that the statute requires. It says, indeed, that "he shall be *deemed*," not *adjudged*, but "that he shall be *deemed* and *taken* to be a *common utterer*." This is a conclusion of law resulting from the conviction founded on the facts of the case, and therefore an adjudication of his being a common utterer is not necessary to be stated in the original record. It is not made necessary by the statute, by the rules of the common law, or by the practice of Courts, nor would it be of any use either to prisoners or the public that it should be so. The JUDGES, therefore, are most clearly of opinion that the conviction is right (*a*).

(*a*) See the Case of Rex v. James Smith, 2 Bos. & Pull. 127. and *ante*, page 956. Case 814. that an indictment on 15 Geo. II. c. 28. for uttering counterfeit money, having at the same time other counterfeit money in his custody, is good, although it do not allege the offender to be A COMMON UTTERER.

1802.

THE KING *against* ROBERT BAKEWELL.

CASE CCCXXXII.

If a Bank clerk, employed in taking account of *paid notes*, embezzle a paid note, which he finds on the file not properly cancelled, and utters it for his own use, he may be indicted on 15 Geo. II. c. 13. for having embezzled *certain effects* belonging to the Bank. *Vide Aslett's Case, post.*

AT the Old Bailey in April Session 1802, *Robert Bakewell* was tried on the statute 15 Geo. II. c. 13. s. 12. which enacts, "That if any officer or servant of the Governor and Company of the Bank of England, *being intrusted* with any note, bill, dividend warrant, bond, deed, or any security, money, or other effects belonging to the said Company, or having any bill, dividend warrant, bond, deed, or any security or effects of any other person or persons, lodged or deposited with the said Company, or with him as an officer or servant of the said Company, shall secrete, embezzle, or run away with any such note, bill, dividend warrant, bond, deed, security, money, or *other effects*, or any part of them, every officer or servant so offending shall be deemed guilty of felony, and shall suffer death as a felon without benefit of clergy."

THE indictment stated, That on 26th March 1802, *Robert Bakewell*, in the forty-first year, &c. at *St. Mary le Bow*, &c. was an officer and servant of the Governor and Company of the Bank of England, and, as such officer and servant, was, then and there, intrusted by the said Governor and Company with *a certain note* belonging to the said Governor and Company, the tenor whereof is as follows: that is to say,

BANK. . . . . .

N° 6528 N° 6528

. . . . . .

16 June 1801.

I PROMISE to pay to *Mr. Abraham Newland* or bearer on demand the sum of Fifty Pounds.

London, 16th day of June, 1801.

£ Fifty For the Gov^r and Comp^a

ENT^D. *C. Clark.* of the Bank of England.

S. UNDERHILL.

And that he, being such officer and servant, and so intrusted with the said note, on the same day, &c. feloniously did secrete, embezzle and run away with the same, against the form of the

1802.

BAKEWELL'S CASE.

statute, &c.—There was A SECOND COUNT, stating that he was an officer and servant of the said Governor and Company as aforesaid, and as such was intrusted with *certain effects* belonging to the said Governor and Company, that is to say, a certain *paid note* (setting it out as in the first count), and that he being such officer and servant as aforesaid, &c. did feloniously secrete, embezzle and run away with the same, against the statute, &c.

THE EVIDENCE.—The prisoner had been in the employment of the Bank of England about two years; and on the 26th March, 1801, was engaged in posting into the ledgers, and in reading from the cash-book those Bank-notes which had been paid on the day but one before, of certain denominations, namely, from 100*l.* and up to 1000*l.* This employment gave him access to the file on which the paid notes were placed on that day, among which was the note in question, which had come into the Bank, and been paid on the 24th March, and which note, it appeared, he had himself put upon the file. The practice of the Bank is, that when a Bank-note is presented for payment, the cashier's name is taken off by the inspector; it then goes to the entering clerk, who enters it into the folio cash-book, and then punches a hole in it, which is called cancelling it; and the hole made by the puncheon is the only evidence that the clerks in the Accountant's Office have to shew that the note is paid, excepting the entry of it in the cash-book. After the balance of the evening is made up, the files are locked up in Mr. *Newland*'s strong-room, and delivered out to the Accountant's Office the next day, when each paid note is posted into the ledger. The note in the present case had been punched, but the hole was not made in the proper part of the note; a circumstance which sometimes happens, from some of the notes, among the quantity punched at the same time, being by accident reversed, which occasions the punch to go through a wrong part; and, in the hurry of business, the cashier's name had not been torn from this note, though it had been punched. It appeared from very clear evidence that the prisoner had secreted this note, and paid it, together with another of 300*l.* to a person of the name of *Hayley* on the 24th January 1802, and that *Hayley* had passed it, in the name of *William Harrison*,

1802.

BAKEWELL'S CASE.

to a linen-draper in *Aldersgate-street*, on the next day but one, for a valuable consideration; but, at this time, the hole made by the puncheon in the white part of the note was patched up, and two large letters, B and C, written on the patch. But it was admitted by the chief clerk of the Accountant's Office, that twenty different clerks of the Bank, in the discharge of their respective duties, had equal access to the file on which notes, when cancelled, are placed. The prisoner, however, confessed that he had taken the note stated in the indictment, together with many others, from the file, declaring that he had done it with a view to shew to the Governors of the Bank that these paid notes might be taken from the file and reissued without their being able to discover the person who so reissued them; and a paper was read, dated the 30th December 1801, and signed both by *Bakewell* and *Hayley*, agreeing to disclose this secret upon a promise of a stipulated reward and a free pardon: a receipt also was produced, dated 24th January 1802, from *Hayley* to *Bakewell* for the note in question, and the other paid note of 300*l.* purporting that the said notes had been received for the purposes and with the intention stated in the paper. An anonymous letter, dated 8th February 1802, was addressed to the Governors of the Bank, offering a disclosure of the whole transaction, and proposing a scheme by which the practice might in future be prevented, on condition of being indemnified and receiving 10,000*l.* but none of these papers came to the knowledge of the Directors until the prisoner had been some time in custody, and had made a voluntary confession of the facts to Mr. *Winter*, the Bank Solicitor.

THE Jury found the prisoner guilty.

SERJEANT BEST, *for the prisoner*, submitted to the Court, that as this note had been paid and cancelled by the Bank, it could no longer be considered either as "a bill, dividend warrant, bond, deed, security, money, or effects." It was once a Bank-note, but, by being paid and cancelled, it had completely lost that character. It had performed its office as a Bank-note, and was not, at the time of the embezzlement, any of the securities mentioned in the statute, but was become a piece of mere waste paper of no value; for that the words "*other*

1802.

BAKEWELL'S CASE.

effects" must mean such other effects as were of a like kind with those that had been enumerated before. BUT THAT, if it were to be considered as a note, or *as effects* belonging to the Bank, he had not been *intrusted* with the possession of it so as to bring him within the statute; for the evidence was, that the only notes with which he was intrusted were notes from 100*l.* up to 1000*l.*, and therefore this note of 50*l.* could not be one of those which he was employed to enter, and of which he had any custody.

GARROW, *for the prosecution*, contended, that as the prisoner had, in the course of his employment as a clerk in the Bank, been intrusted with the file on which cancelled notes were put, and on which file he had himself put the note in question, he had clearly been intrusted with it; and that every clerk or servant of the Bank of England, who in the course of his duty embezzles *any thing of any kind* belonging to the Bank which may be placed in his custody, is an offender within the meaning of the Act. But it is contended that these paid notes, which are certainly not Bank-notes in the popular meaning of the words, are not the sort of *effects* the embezzling of which is within the meaning of the statute, because they have been paid and cancelled, and are therefore, it is said, mere waste paper, and of no value: but the prisoner himself has experienced the possible value of these cancelled notes, for he has received the money for this note, and put it into circulation as a valid *Bank-note*. But admitting that it ceased to be a Bank-note, and that it will no longer bear that denomination, yet it still remains a part of *the effects*, and *valuable effects*, belonging to the Bank. Why does the Bank regularly enter these paid notes, and preserve them with so much care as nightly to lock up the file on which they are put, in the strong room, if they are of no importance or value? Why do they not directly destroy them at once when thus paid? because they cannot consistently with the utility they may be of to the extensive commerce of the country, which, on various occasions, may require these effects or papers to be resorted to and produced for the benefit of the public. Each particular note furnishes evidence of its having been paid, and its preservation is

highly important for the purpose of tracing the channels through which it may have past. Can, therefore, such instruments be fairly considered as waste paper of no real value? 1802. BAKEWELL'S CASE.

THE Jury found the prisoner guilty.

THE COURT said, that on looking through the Act they had very little doubt on the subject. The prisoner is charged with secreting a certain paid note, which is certainly part of the *effects* belonging to the Bank. However, as the point is important, and as there has been no decision on the subject, the case shall be saved for the opinion of THE TWELVE JUDGES.

THE JUDGES never publicly delivered any opinion on this case: and it was said by MR. JUSTICE LE BLANC, in the Case of *Rex* v. *Aslett* (1), that the case was never decided, but that it went off on other considerations.

(1) *Post*, September Session, 1803, page 962.

THE KING *against* EASTERBY AND MACFARLANE.

CASE CCCXXXIII.

AT the Admiralty Sessions holden at the Old Bailey, on Tuesday 26th October 1802, *William Codling*, *John Reid*, *William Macfarlane*, and *George Easterby*, were tried before LORD ELLENBOROUGH, present SIR WILLIAM SCOTT, on the statute 11 Geo. I. c. 29. s. 6. which enacts, "That if any *owner* of, or *captain*, master, officer or mariner belonging to, any ship or vessel, shall wilfully cast away, burn, or otherwise destroy the ship or vessel, of which he is owner, or to which he belongeth, or in any wise direct or procure the same to be done, with intent or design to prejudice any person or persons, that hath or shall underwrite any policy or policies of insurance thereon, or of any merchant or merchants, that shall load goods thereon, or of any owner or owners of such ship or vessel, the person or persons offending therein, shall suffer as in cases of felony, without benefit of clergy." And by section 7. it is further enacted, "That if any of the said offences shall be committed on the high seas, the same shall be inquired of, tried, determined, and adjudged before such

Accessaries before the fact *on shore*, to the wilful destruction of a ship on *the high seas*, were not triable by the Admiralty jurisdiction under 11 Geo. I. c. 29. s. 7.—But see now the 43 Geo. III. c. 113. *post*, page 952. S. C. 1 East, Addenda, xxvi.

1802.

EASTERBY'S CASE.

court, and in such manner and form as directed by 28 Hen. VIII. c. 15 (*a*).

THE indictment consisted of sixteen counts. The first count charged, that *William Codling* and *John Reid*, on the 8th August 1802, upon the high sea, within the jurisdiction of the Admiralty of *England*, TO WIT, about the distance of one league from the coast of *Sussex*, were on board a certain vessel, called *The* Adventure; that *William Codling* was then and there *the master* of, and belonging to the said vessel; that *John Reid* was then and there *a mariner*, belonging to the said vessel; that the said vessel was, then and there, insured to a great amount in value, to wit, to the amount of 700*l.* by *Robert Sheddon*, *Joseph Marryatt*, *Thomas Rider*, *William Ness*, *Joseph Honeyman*, and *Joseph Nash*, who had before that time, TO WIT, on the 1st July 1802, severally and respectively underwritten a certain policy of insurance on the said vessel; and that the said *William Codling*, and the said *John Read*, so being such master and mariner belonging to the said vessel, on the said 8th August 1802, with force and arms, on the high sea aforesaid, within the jurisdiction aforesaid, TO WIT, about the distance of one league from the coast of *Sussex*, wilfully and feloniously did make certain holes, TO WIT, three holes in and through a certain part of the said vessel, called The Adventure, by means whereof the water of the said sea did, then and there, enter, fill, and sink the said vessel; and that the said *William Codling*, and the said *John Reid*, so being such master and mariner belonging to the said vessel, did thereby, then and there, wilfully and feloniously destroy the said vessel, to which the said *William Codling* and *John Reid* did then and there respectively belong as aforesaid, with a wicked and dishonest intent and design, then and there, to prejudice the said *Robert Sheddon*, *&c.* who had before that time, to wit, on the said 1st day of July 1802, severally and respectively underwritten the aforesaid policy of insurance on the said vessel, and was, then and there, TO WIT, on the 8th August 1802, on the high sea aforesaid, within

(*a*) And see the statute 45 Geo. III. c. 72. ss. 114.

the jurisdiction aforesaid, TO WIT, about the distance of one league from the coast of *Sussex* aforesaid, severally and respectively insurers thereof, against the form of the statute. THE SECOND COUNT charged, that *William Macfarlane* and *George Easterby*, on the 8th August 1802, *on the high sea aforesaid, within the jurisdiction aforesaid*, TO WIT, about the distance of one league from the coast of *Sussex*, were *owners*, and each of them was *an owner* of the said vessel, called The Adventure, and so being such owners, and each of them being such owner as aforesaid, did then and there, with force and arms, wilfully and feloniously *procure the said William Codling and the said John Reid, the felony aforesaid, in manner and form aforesaid, to do, commit and perpetrate*, they the said *William Macfarlane* and *George Easterby*, at the time of the felony done, committed and perpetrated by the said *William Codling* and *John Reid* as aforesaid, being then and there *owners*, and each of them an owner of the said vessel, called The Adventure, with a wicked and dishonest intent and design, then and there to prejudice the said *Robert Sheddon*, &c. who had before that time, TO WIT on the 1st day of July 1802, severally and respectively underwritten the aforesaid policy of insurance on the said vessel, and were then and there, TO WIT, on the said 8th August 1802, on the high sea of, or within the jurisdiction aforesaid, from the coast of *Sussex* aforesaid, TO WIT, about the distance of one league, severally and respectively insurers thereof, against the form of the statute, &c. THE THIRD and FOURTH COUNTS, charged the prisoners respectively with *destroying*, and with *procuring the destruction* of the said vessel, with intent to prejudice *Joseph Marryatt*, who had underwritten a policy of insurance on the said vessel, to the amount of 100*l.* THE FIFTH and SIXTH COUNTS, charged them respectively as principals and accessaries with *casting away* the said vessel, with intent to prejudice *R. Sheddon*, &c. to the amount of 700*l.* THE SEVENTH and EIGHTH, the same as 5th and 6th counts, only with intent to prejudice *Joseph Marryatt*, an insurer to the amount of 100*l.* THE NINTH and TENTH, the same as 1st and 2nd, only stating *Reid* to be *an*

1802.

EASTERBY'S CASE.

officer, instead of *a mariner*. THE ELEVENTH and TWELFTH the same, only with intent to prejudice *Marryatt* an insurer for 100*l*. The four other counts stated, that they had *cast away* the said vessel.

THE evidence, as far as it is material to state it, was as follows. By the production of the ship's register from the Custom House in *London*, it appeared that on the 12th June 1802, one *A. Geddes* was the *registered owner* of The Adventure, and that the same ship was afterwards, on the 16th June 1802, assigned by *Geddes*, by indorsement on the register, to the prisoner *William Macfarlane*, from whom no subsequent assignment appeared to have been made; but both *Easterby* and *Macfarlane* openly and upon all occasions avowed themselves to be the joint, and only proprietors of the whole ship and its cargo, and acted as such owners in hiring the sailors, and in giving orders to *Codling* as the master of the vessel, both before and after she was destroyed, and by ordering insurances of 700*l*. to be made on the vessel, and 10,250*l*. upon her cargo. The vessel, after taking in part of her cargo in the port of *London*, sailed with it to *Yarmouth*, where she took in other part thereof, and from thence to *Deal*, from which place she again sailed, until she arrived within a few miles from *Brighton*, on the coast of *Sussex*, where, by the orders, and in the presence, and with the assistance of the prisoner *Codling*, she was sunk in the manner described in the indictment. Two days after this loss *Easterby* and *Macfarlane* gave a joint notice in writing, signed in their names, of abandonment to the underwriters, as joint proprietors of the cargo, and *Macfarlane* gave a separate notice of abandonment, on his part, as owner of the vessel. But suspicion arising in the minds of the underwriters, they caused the vessel to be weighed up, and brought to land, when it appeared that instead of a cargo to the amount of 10,250*l*. being on board, there were only goods of the original value, as between buyer and seller, to the amount of 3230*l*.: and on further inquiry it appeared, and it was proved, that large quantities of goods which either were, or were to have been part of

the original shipment, were found concealed in the houses both of *Easterby* and *Macfarlane*. It was also further proved by the testimony of one *Storrow*, who had been applied to by *Easterby* to join the ship, in the character of supercargo, that *Codling*, *Macfarlane* and *Easterby* had, previously to the sailing of the vessel, been frequently at each other's houses, and preconcerted the destruction of this vessel, with a view to call upon the underwriters. But there was no evidence that either *Easterby* or *Macfarlane* was ever personally present *on board the vessel on the high seas.*

KNOWLYS, *for the prisoners*, contended, First, that the prisoner *Easterby* could not be considered as an *owner* of this vessel, so as to subject him to the penalties of 11 Geo. I. c. 29. s. 6. because the requisites specified in the statutes 26 Geo. III. c. 60. and 34 Geo. III. c. 68. had not been complied with. SECONDLY, that, assuming *Easterby* and *Macfarlane* to be the owners of the vessel, and that they had feloniously procured her to be destroyed within the meaning of 11 Geo. I. c. 29. s. 6. yet that as no act or deed on their part had been committed or done on board the vessel while she was on the high seas, they could not be offenders within the jurisdiction of the Admiralty Court, under the seventh section of the Act.

THE COURT left the fact of the wilful destruction of the vessel by *Codling* and *Reid*, and of the wilful procurement of such destruction by *Easterby* and *Macfarlane*, with intent to prejudice the underwriters, to the Jury, who acquitted *Reid*, and found the other prisoners guilty. *Codling* received sentence of death, and was afterwards executed. But the case, as to *Easterby* and *Macfarlane*, was referred, on the two objections above stated, to the consideration of THE JUDGES.

THE case was first argued in the Exchequer Chamber, in Michaelmas Term 1802, and afterwards in Serjeants' Inn Hall.

THE Judges met on 2d February 1803, to consider this case, and they were unanimously of opinion, that as no act had been done by the prisoners *Easterby* and *Macfarlane*, within

1802.

EASTERBY'S CASE.

the jurisdiction of the Admiralty, the trial had been improper. No opinion therefore was given on the other points of the case.

But now by the statute 43 Geo. III. c. 113. which repeals the statutes 4 Geo. I. c. 12. s. 3. and 11 Geo. I. c. 29. ss. 5, 6, 7, it is enacted, "That if any person shall wilfully cast away, burn, or otherwise destroy any vessel, or in any wise counsel, procure or direct the same to be done, and the same shall be accordingly done, with intent to prejudice any owner of the vessel, or of her cargo, or any underwriter on the same, he shall suffer death without clergy: *the principal* to be tried by the Common Law Court, or in the Admiralty Court, as the offence shall be respectively committed, within the body of a county, or on the high seas, AND THAT *accessaries before the fact*, whether the principal felony be committed within the body of a county, or on the high seas, may be tried by the common law courts, if the principal felony was committed within the body of a county, and by the Admiralty Court if committed on the high seas; but the accessary shall not be tried more than once for the same offence."

CASE CCCXXXIV.

If a bureau be delivered to a carpenter to repair, and he discover money in a secret drawer of it, which he unnecessarily as to its repairs, breaks open, and converts the money to his own use, it is a felonious taking of the property, unless it appear that he did it with intention to restore it to its right owner.—See 8 Vezey's Rep. 405.

CARTWRIGHT *against* GREEN.

Ann Cartwright died possessed of a bureau; in a secret part of which she had concealed nine hundred guineas *in specie*. After her death *Richard Cartwright*, her personal representative, lent the bureau to his brother *Henry*; who took it to the East Indies, and brought it back without the contents of it being discovered. It was then sold to a person of the name of *Dick* for three guineas, who delivered it to one *Green*, a carpenter, for the purpose of repairing it. *Green* employed a person named *Hillingworth*, who found out the money, and he received a guinea for his trouble. In consequence of this discovery the whole sum of nine hundred guineas was secreted by *Green*, by *Green's* wife, and by one

1802.

GREEN'S CASE.

Elizabeth Sharpe, and converted to their own use. On these suggestions, *Cartwright*, the personal representative of the original owner of this bureau, filed a bill of discovery in the Court of Chancery, against *Green* and his wife, and *Mrs. Sharpe*, in which bill *Dick* joined, but did not claim any of the money on his own account. But to this bill the three defendants demurred, on the ground that an answer to the discovery sought, might subject them to criminal punishment.

HART, in support of *the demurrer*, contended that this bureau was delivered to *Green* for the *specific purpose* of being repaired, and that his opening this secret drawer and converting the money to his own use was a felony; that therefore neither he nor *Elizabeth Sharpe* could be called upon to criminate themselves, nor could *Green*'s wife be called upon to criminate her husband (1).

(1) Le Texier *v.* Margravine of Anspach. 5 Vezey 322.

ROMILLY *contra* contended, that the taking by the defendants could not be considered as a felonious taking, because it might have been with a view to restore it to the true owner.

17 Nov. 1803.

LORD ELDON, *Chancellor*. The real question is, whether this bill charges A FELONY; upon which the distinctions are so extremely nice, and depend upon attention to so many cases, and are so important in the consequences, that I will not trust myself to say any thing upon them, until I have seen *all the cases*, and consulted *several of* THE JUDGES. And afterwards, his Lordship delivered his opinion as follows. This case involves a very delicate consideration *in equity*; for whatever was the old doctrine as to larceny, distinctions have been taken in late cases, which make it frequently the subject of very nice consideration, whether the taking is a *trespass*, or only a *breach of trust* (2). I have looked into the books, and have talked with some of the Judges and others, and I have not found in any one person a doubt, that this is A FELONY. To constitute felony, there must of necessity be a felonious taking. Breach of trust will not do. But from all the cases in *Hawkins*, there is no doubt that this bureau being delivered to *Green*, for no other purpose than to repair, if he broke open any part, which it was not necessary to touch for

28 April 1803.

(2) See Rex *v.* Pear, *ante*, page 212. Case 105. Rex *v.* Semple, *ante*, page 420. Case 196.

1802.

GREEN'S CASE.

the purpose of repair, but with an intention to take and appropriate to his own use what he should find, that is a felonious taking, within the principle of all the modern cases; as not being warranted by the purpose for which it was delivered. If a pocket-book containing bank notes were left in the pocket of a coat, sent to be mended, and the tailor took the pocket-book out of the pocket, and the notes out of the pocket-book, there is not the least doubt, that it is felony. So, if the pocket-book was left in a hackney-coach, if ten people were in the coach in the course of the day, and the coachman did not know to which of them it belonged, he acquires it by finding it certainly, but not being intrusted with it, for the purpose of opening it, that is felony, according to the modern cases (1). There is a vast number of other cases. Those with whom I have conversed upon this point, who are of very high authority, have no doubt upon it. As to *Green's* wife, if this act was a felony in her husband, she would be protected; at all events she cannot be called upon to make a discovery against her husband; and as to *Elizabeth Sharpe*, she is directly implicated.

(1) Wynne's case, *ante*, p. 413. Case 191.

THE demurrer was accordingly allowed.

CASE CCCXXXV.

THE KING *against* ROBERT ASLETT.

THE FIRST CASE.

If an indictment charge the prisoner with having embezzled "certain bills, commonly called *Exchequer Bills*," and it appears that the person who signed them on the part of government, was not legally authorized so to do, the indictment is bad: for they are not the things which they are averred to be.

AT the Old Bailey in July Session 1803, *Robert Aslett* was tried before MACDONALD, *Chief Baron*, present MR. JUSTICE ROOKE and MR. JUSTICE LAWRANCE, on the statute 15 Geo. II. c. 13. s. 12. for feloniously secreting, embezzling, and so stealing and carrying away three Exchequer Bills, No. 141, No. 2694, and No. 1060, of the value of 1000*l.* each, belonging to the Governor and Company of the Bank of England. The indictment consisted of a great variety of counts, but they all charged the property, alleged to have been stolen, to be "certain bills commonly called *Exchequer Bills*."

1803.

ASLETT'S CASE.

IT appeared from the opening of Mr. GARROW, the Counsel for the prosecution, that *Mr. Aslett* had, for three and twenty years, been *a cashier* of the Bank of England, under *Mr. Abraham Newland*, in which capacity he had the custody of those Exchequer Bills which the Bank buy from time to time, and keep until they are paid off; that the three bills mentioned in the indictment were parts of parcels of Exchequer Bills so bought by the Bank; and that *Mr. Aslett* had secreted them, and converted them to his own use. But it further appeared, that by the statute 39 Geo. III. c. 41. the Commissioners of the Treasury, or any three or more of them, were authorized to issue Exchequer Bills to the amount of five millions, "PROVIDED ALWAYS that every such Exchequer Bill shall and may be signed by the Auditor of the Receipt of his Majesty's Exchequer, or in his name, by any person duly authorized by the said Auditor to sign the same, with the approbation of the said Lords Commissioners of the Treasury, in writing, under their hands, or of any three or more of them;" and that this proviso had been continued in all the subsequent statutes relating to Exchequer Bills (1), and also in the statute of the 43 Geo. III. c. 5. under which the Bills mentioned in the indictment had issued. It also appeared that *Robert Jennings, Esq.* had been duly authorized, by the said Auditor, and approved by the said Lords Commissioners of the Treasury, to sign the Exchequer Bills issued by virtue of 39 Geo. III. c. 41.; but that his authority had been omitted to be renewed under the statutes mentioned in the margin; and that, notwithstanding such omission, he had continued to sign such Exchequer Bills as if the authority given to him by virtue of 39 Geo. III. c. 41. had extended to all Exchequer Bills subsequently issued. It also appeared that the Legislature, to remedy this defect, had thought proper, by the statute 43 Geo. III. c. 60. to make all such Exchequer Bills as had issued and been signed by *Mr. Jennings* previous to 24th June 1803, valid as to all civil purposes, contracts and engagements; but there was A PROVISO "That nothing in that Act contained should prejudice, or affect in any manner whatever, any prosecution then depending, or which might be thereafter commenced for, or

(1) 39 Geo. III. c. 69. 39 Geo. III. c. 70. 39 Geo. III. c. 71. 39 Geo. III. c. 114. 39 & 40 Geo. III. c. 4. 41 Geo. III. c. 14.

1803.

ASLETT'S CASE.

relating to, any Act, done previous to the passing of the Act touching or concerning, or relating to the said Exchequer Bills, or any of them so signed by the said *Robert Jennings* in the name of the said Auditor of his Majesty's Exchequer."

ERSKINE and SERJEANT BEST, *for the prisoner*, contended, That the Bills in question were not legal Exchequer Bills, and as the indictment, in every count of it, averred the instruments alleged to have been embezzled to be *Exchequer Bills*, the allegation was not proved, and the prisoner must be acquitted. They argued, that in order to constitute a good and real Exchequer Bill, the direction of the statute, under which alone this species of security could be created, must be accurately and punctually observed; that there is no power given to the Lords of the Treasury to issue these Bills, except in the very form and manner prescribed by the Act; and that as to the purpose of the present prosecution, the Bills now produced, not being Exchequer Bills, are nothing, and not cognizable as special property; that it was clear that the special authority given to *Mr. Jennings*, by and in strict conformity to the 39 Geo. III. c. 41. could not extend beyond the number of Exchequer Bills therein authorized to be issued; that in all the cases of securities which Government have a right to create, it is for Government to say under what form they shall be created; but that whatever the prescribed form may be, it must be observed, or the security is not created; that the statute 43 Geo. III. c. 60. which recites all the facts necessary to the question, was a public parliamentary declaration that these securities were not, at the time they were embezzled, real and good Exchequer Bills; and that any attempt to argue the point upon the analogies of law could only, in so clear and plain a case, tend to darken the subject it was intended to illustrate.

GARROW, *for the Crown*, submitted that the Legislature, by the proviso in 43 Geo. III. c. 60. had left the question as to these Bills precisely in the same state it was in before the Act; that although these Bills might not be considered as good *Exchequer Bills* for all purposes, yet that as the public

1803.

ASLETT'S CASE.

had had the benefit of the money raised by them, they must be considered good Exchequer Bills as against the Exchequer, and, *à fortiori*, as against the prisoner, a wrong doer, who was intrusted with them by THE BANK OF ENGLAND, who may be said to have purchased them of the Exchequer; and he cited the case of *Rex* v. *Colin Reculist* (1), that an instrument, as a forged Bill of Exchange, though it would be invalid, if genuine, for want of a proper stamp, was sufficient to support a criminal prosecution against the party forging it.

(1) *Ante*, page 703. Case 290.

THE LORD CHIEF BARON. The observation that these papers are now to be considered as Exchequer Bills, because the Bank of England purchased them as Exchequer Bills, and because they have, in that character, answered the purposes for which they were originally created, can have no effect in the present case, for these circumstances cannot alter the nature of the fact. In the Case of *Colin Reculist*, the indictment charged him with having uttered a false instrument, *purporting* to be a Bill of Exchange; but here it is positively averred that these Bills are genuine *Exchequer Bills*, which certainly they were not at the time they are alleged to have been embezzled: I am therefore of opinion that the objection is good, and that the proposed evidence will not prove the charge.

MR. JUSTICE ROOKE.—I form my opinion on the words of the indictment, which, in all its counts, avers these papers to be "Exchequer Bills;" but by what appears in 43 Geo. III. c. 60. it is impossible to say that they were *Exchequer Bills*, at the time they were embezzled.

MR. JUSTICE LAWRANCE.—In all indictments the property must be proved as it is charged: as, for instance, in cases of larceny, the goods stolen must be proved according as they are described. Here the charge is, that the prisoner embezzled "*Exchequer Bills*," and "Bills commonly called Exchequer Bills," and they must therefore be proved to be Exchequer Bills. The essence of the charge against *Colin Reculist* was, that he made "a false instrument, *purporting* to be a Bill of Exchange;" but here the essence of the charge

1803.

ASLETT'S CASE.

is, that these are good and true Exchequer Bills; but, as the formalities required by the statute by which they were created have not been complied with, I am of opinion they were not good Exchequer Bills, and that the prisoner must be acquitted.

Mr. Aslett was acquitted accordingly: but he was detained for the purpose of being again indicted under a different charge.

CASE CCCXXXVI.

THE KING *against* ROBERT ASLETT.

THE SECOND CASE.

Exchequer Bills, although signed by a person not authorized so to do, are *securities* and *effects*, within the statute 15 Geo. II. c. 13. s. 12. S. C. 1 Bos. and Pull. New Rep. 1.

AT the Old Bailey in September Session 1803, *Robert Aslett* was indicted on the statute 15 Geo. II. c. 13. s. 12. before MR. JUSTICE LE BLANC, for feloniously secreting, embezzling and running away with three Exchequer Bills, No. 835, for 500*l.* No. 2694 and No. 1061, for 1000*l.* each.

THE indictment consisted of eighteen counts. THE FIRST COUNT charged, "That he on 26th February, &c. being an officer and servant of the Governor and Company of the Bank of *England*, was, as such officer and servant, intrusted by them with *certain effects* belonging to the said Governor and Company, that is to say, a certain paper partly printed and partly written, *purporting* to be a bill, called an Exchequer Bill, No. 835, &c. the tenor of which said paper, &c. (setting out the bill) which said paper was, then and there, belonging to the said Governor and Company, and of the value of 500*l.* and which sum was, then and there, unpaid and unsatisfied to the said Governor and Company the holders thereof." It then set out the other bills, and concluded "that the said *R. Aslett*, being such officer and servant, &c. and so intrusted, &c. with the said *effects*, did feloniously secrete, embezzle, and run away with the said *effects*, so belonging to the said Governor and Company of the Bank of *England*, and of the value of 2500*l.* contrary to the form of the statute." THE SECOND COUNT stated the *effects* to be "certain papers, &c. upon the credit whereof

the said Governor and Company, &c. had advanced a large sum of money, to wit, &c." THE THIRD COUNT stated *the effects* to be "certain papers, &c. purporting to be bills commonly called Exchequer Bills. And THE OTHER COUNTS, as far as material to the present case, only varied from the former, by calling the property secreted *securities*, instead of *effects*.

THE statute 15 Geo. III. c. 13. s. 12. enacts, "That if any officer or servant of the Bank, being intrusted with any note, *bill*, dividend, warrant, bond, deed or any *security*, money or *other effects*, belonging to the said Company, or having any bill, dividend, warrant, bond, deed, or any security, or effects of any other person or persons, lodged or deposited with the said Company, or with him as an officer or servant of the said Company, shall secrete, embezzle or run away with any such note, bill, dividend, warrant, bond, deed, security, money or effects, or any part of them, he shall be guilty of felony without benefit of clergy (*a*)."

THE substance of the evidence was as follows:

THE prisoner, *Mr. Robert Aslett*, was elected a clerk in the Bank, on 19th March 1778; appointed assistant cashier under *Mr. Abraham Newland*, on 19th September 1793, and advanced to the situation of cashier on 17th January 1799; in which capacity he continued to act until the day he was apprehended. When the Bank purchase Exchequer Bills, it was *Mr. Aslett*'s duty to sign the orders for the payment of the purchase-money; to keep the bills in his custody until a number had been collected, and then to carry them to the Directors, to be locked up in the strong room; but they are often kept under the care of the cashier, for some weeks before they are deposited with the Directors; and the Governors of the Bank never re-sell any Exchequer Bills that

(*a*) The same is enacted by 25 Geo. III. c. 66. s. 6. and the 37 Geo. III. c. 46. for making certain annuities created by the parliament of Ireland, transferable, and the dividends payable at the Bank of *England*, with respect to the officer and servants of the Bank: And see 24 Geo. II. c. 11. s. 3. as to the South Sea Company.

1803.

ASLETT'S CASE.

have been purchased by them; it is therefore impossible for any bill when it is once so deposited with the cashier, ever to get again into the market, without fraud in some person or another, in the employment of the Bank. On the 26th February *Mr. Aslett* was the cashier, who conveyed the Exchequer bills, from the cashier's office to the Directors. In the month of December 1802, Exchequer Bills to a large amount were purchased by the Bank, and deposited with *Mr. Aslett*, among which were the Exchequer Bills stated in the indictment. On the 14th March 1803, *Mr. Aslett*, through the medium of *Mr. Bish* the stock-broker, made a time speculation in the consols, to the amount of 50,000*l.* and gave *Mr. Bish* three Exchequer Bills of 1000*l.* each, to cover any difference that might happen against him on the said speculation, among which was one of the bills stated in the indictment, and all of them parcel of the bills which had been before delivered into *Mr. Aslett*'s custody as cashier. On these facts being communicated to the Directors, *Mr. Aslett* was apprehended, and on searching his private desk, Exchequer Bills belonging to the Bank were found, to the amount of 16000*l.*; and another bundle, in the form and manner in which Exchequer Bills are made up to be carried into the Directors' parlour, to the amount of 200,000*l.* It also appeared, that he had disposed of other Exchequer Bills belonging to the Bank, to several persons to a very considerable amount. It was admitted by the Counsel for the prosecution, that the person who had signed these bills was not legally authorized so to do at the time they were issued, and of course that they were not at the time of the embezzlement valid and legal Exchequer Bills. But to remedy this defect, it was enacted by 43 Geo. III. c. 60. "That, after 24th June 1803, all preceding Exchequer Bills, signed *in the name* of the auditor of the Exchequer, should be deemed to be, and to have been for all civil purposes, contracts, and engagements, as valid, and in as full force to all intents and purposes from the issuing the same, as if the same had been signed by the said auditor, PROVIDED, that nothing therein contained, should extend or be construed to extend to prejudice, or affect in any

manner whatsoever any prosecution now depending, or which may be hereafter commenced, for or relating to any act done previous to the passing of this Act, touching, or concerning, or relating to the said Exchequer Bills, so signed in the name of the said auditor." 1803. ASLETT'S CASE.

THE COUNSEL, *for the prisoner*, immediately after the opening of the prosecution, and of course previous to any evidence being given, submitted to the court, upon the law of the case, that as it had been determined by the acquittal of the prisoner upon the former indictment, that the papers he was charged with having embezzled, were not *Exchequer Bills* at the time of the embezzlement, he could not now be legally charged with having embezzled the same papers, as being *effects* belonging to the Bank of *England*, he having committed no other act of embezzlement than that contained in the former indictment: for although the remedial statute of 43 Geo. III. c. 60. had rendered these defective papers good and valid *Exchequer Bills*, and securities as to *civil purposes*, and satisfied the public mind, that they were good and valid, as to the monies they were issued to secure, yet the remedy could not be so far extended, in the case of a criminal charge for a capital offence, as to make them, with respect to such a charge, more valuable than they were before; the statute itself having impliedly declared that these papers were, previous to the passing it, mere waste papers, and of no value at the time the embezzlement of them took place, and therefore could not, *ex post facto*, by the PROVISO make them *valuable effects*, or securities within the words "other effects" in the statute 15 Geo. II. c. 13. s. 12. which words, they contended, must be taken to mean "other effects" of the like kind, as those which were before mentioned in the Act, *viz.* notes, bills, dividend warrants, bonds, deeds or securities; for that to make the stealing of property felony, it must be property of such a kind as has some value in itself, and that value not arising merely from its relation to collateral things (1), as being bonds, bills, notes, and other mere *choses in action* which were not the subjects of larceny at Common Law, because they were of no *intrinsic value*, and did not import any *pro-*

Mr. Erskine, Serj. Best, Mr. Giles.

Vide *ante*, page 954.

(1) 2 East's C. L. 597.

1803.

ASLETT'S CASE.

perty in possession of the person from whom they are taken (1). This was the reason of passing 2 Geo. II. c. 25. for before that Act *choses in action* could not be counted upon as property of any value, except by connecting them with their value as securities. A larceny therefore of cancelled bank-notes cannot be the subject of larceny, because the paper is of no value; and the case of *Rex* v. *Bakewell* (2), where this point was considered of sufficient magnitude to be referred to the Judges, though it went off upon another point, and therefore did not call for the decision of the Judges.

(1) 4 Bl. Com. 234. 1 Hawk. ch. 33. sect. 22.

(2) Rex v. Bakewell, O. B. April Sess. 1802, *ante*, page 943. Case 852.

MR. JUSTICE LE BLANC. The case alluded to was never decided.—The question in the present case is, whether the general term "effects" which is used in the 15 Geo. II. c. 13. s. 12. ought to receive so limited a construction as to warrant the Court in saying, that it shall not extend to any thing, that is not in itself of intrinsic value. The word "securities" is used as well as the word "effects," which shews that the Legislature intended, that the statute should extend to other kinds of property than securities; the word effects being of a larger and more comprehensive meaning, than the word securities. As to the necessity of those effects being valuable effects, it is to be considered that the statute 15 Geo. II. c. 13. s. 12. has no words denoting that the Legislature intended to make the embezzling of the effects of the Bank *a larceny*; on the contrary it positively declares, that the offender shall, in such case, be deemed guilty of *felony*; and therefore, perhaps, there is not so close an analogy between this offence and the offence of larceny, as seems to be imagined. I am therefore of opinion that the witnesses should be called, and that the trial should proceed.

THE witnesses were accordingly heard; and, on the facts proved, the Jury found the prisoner guilty: but the case was saved for the consideration of THE TWELVE JUDGES; and it was afterwards argued in the Exchequer Chamber by MR. ERSKINE for the prisoner, and by MR. GILES for the Crown.

ERSKINE, *for the prisoner*. Larceny, by the common law, is confined to the taking and carrying away personal chattels of some intrinsic value; for freehold property being, in

1803.

ASLETT'S CASE.

general, of a fixed nature, and incapable of asportation, it was thought unnecessary to protect it by similar severities. Various statutes, however, have extended the law of larceny to various other subjects, and it is now felony to steal iron, brass, copper, lead, and other articles, though fixed to the freehold (1); to rob fish-ponds (2), or to lop timber-trees (3); but in all these alterations no legislative idea has ever been entertained to lessen the value of that species of property, which, by the common law, was subject of theft or larceny. The reason why the Legislature, by the 2 Geo. II. c. 25. made Exchequer Bills, Bank-Notes, South-Sea Bonds, East-India Bonds, Dividend Warrants, Bills of Exchange, Navy Bills, Bankers' Cheques, Bonds, and other *choses in action*, subjects of theft, was because the mere paper itself on which these securities were drawn was of no intrinsic value; it therefore became necessary, by the pre-established principles of the common law, to denominate their value, by enacting that the stealer of them shall be guilty of a felony of the same nature and in the same degree as if he had *stolen* or *taken by robbery* any other goods of *like value with the money due on such securities*; thereby importing that the stealing of such securities should thereafter be considered an offence of equally public injury as the stealing of the identical property thereby intended to be secured; but no provision was made for the safety of property of less value than that which the common law had made it larceny to steal and carry away. The statute also of 15 Geo. III. c. 13. was made to bring within the law of larceny certain persons, who, by the common law, were exempted from that law by the relative and peculiar situation in which they happened to stand at the time the offences therein described were committed, and thereby to place the servant, who should embezzle his master's property, upon the same footing and under the same law as the common thief (4). Other statutes had before, and with the same view, made alterations respecting the *subject-matter* of larceny, but none with respect to *the value* of the property stolen. It cannot therefore be imagined that in making this statutory provision for the security of THE BANK OF ENGLAND, any species of property of inferior value to

(1) 4 Geo. II. c. 32. 21 Geo. III. c. 68.

(2) 22 & 23 Car. II. c. 25. Rex v. Mallinson, 1 Bur. 682. 2 East, P. C. 610. 5 Geo. III. c. 14.

(3) 6 Geo. III. c. 36 & 48. 13 Geo. III. c. 33.

(4) See 21 Hen. VIII. c. 7. and the Case of Rex v. Waite, *ante*, page 28. Case 14. and Rex v. Beazely, *ante*, page 835. Case 311.

1803.

ASLETT'S CASE.

that which is required in cases of larceny, if taken from a private individual, should have been in the contemplation of the Legislature in making this BANK ACT, as it is generally called. Yet if this word "effects" is to receive the extensive construction contended for by the Bank, it will follow, that if a Bank clerk take the smallest scrap of paper, or even an old worn-out pen, belonging to the Bank, he will be guilty of a capital offence, though if stolen from a private individual it would not amount to petty larceny: for, *de minimis non curat lex.* The words of the statute are, "that if any officer or servant of the Bank, being intrusted with any note, bill, dividend warrant, bond, deed, or any security, money, or *other effects* belonging to the said Company, shall secrete, embezzle, or run away with any such note, bill, dividend warrant, bond, deed, security, money or *effects*, or any part of them, he shall be deemed guilty of FELONY, &c." From the wording of this Act it is probable that the Legislature intended to include, by the word *effects*, property of different descriptions from the securities therein mentioned, such as bullion, or other valuable articles of the like kind, more especially as the words "*other effects*" immediately follow the word "*money*," and therefore must mean other effects of the like kind: This construction is strengthened and warranted by the words of the 39 Geo. III. c. 85. an Act made *in pari materia* to protect masters against the embezzlement of their clerks or servants, by which it is declared, "that if any servant or clerk to any person or persons whomsoever shall receive or take into his possession any money, goods, bond, bill, note, banker's draft, or other *valuable security or effects*, and shall fraudulently embezzle the same, he shall be deemed to have feloniously *stolen* the same, and shall be *transported for any term not exceeding fourteen years.* The word *effects*, therefore, in each statute must be intended to mean effects *ejusdem generis*, that is, *valuable effects*; for can it be imagined that the Legislature could intend to punish with transportation only, the servants of bankers, who should embezzle articles possessing an intrinsic value, when intrusted to them by private persons, and, at the same time, to punish with death servants of the

1803.

ASLETT'S CASE.

Bank who should embezzle articles of so trifling a kind, as not to be the subject even of petty larceny at common law? It cannot be contended that these papers, which were intended to be, but certainly are not, Exchequer Bills, are *securities* within the meaning of the Act; for a security must be available in law, which these papers are not: they are mere waste papers, not Exchequer Bills. The person who shall forge or knowingly utter an Exchequer Bill may certainly be convicted of the forging or uttering, though the instrument itself be void for want of a stamp, but larceny and forgery are crimes of a very different and distinct description from each other: forgery gives a fictitious value to an instrument which is in fact worth nothing; but larceny takes from the possession of another something which has, at the very time, acquired a real value.—ANOTHER QUESTION, however, arises in this case, *viz.* Whether the punishment of death inflicted on the offences described by the 15 Geo. II. c. 13. is not virtually repealed by the statute 39 Geo. III. c. 85. which inflicts on the same species of crime the punishment of transportation only (*a*). The 39 Geo. III. c. 85. RECITES, That whereas bankers, merchants, and others are, in the course of their dealings and transactions, frequently obliged to intrust their servants, clerks, and persons employed by them in the like capacity, with receiving, paying, negotiating, exchanging, money, goods, bonds, bills, notes, &c. and that DOUBTS had been entertained whether the embezzling the same by *such servants*, clerks, &c. amounts

(*a*) The general words of the 39 Geo. III. c. 85. may, says Mr. East, "be thought to do away the capital part of the punishment inflicted by 15 Geo. II. c. 13.; but that the Legislature could not have such a repeal in contemplation, because the 39 Geo. III. c. 85. recites, that doubts had been entertained whether the offences described therein amounted to felony by the law of England, which doubts could never have attached on the cases particularly provided for and expressly made felony by 15 Geo. II. c. 13. respecting the officers and servants of the Bank of England, &c. whose embezzlements were before specially inhibited and made felony without benefit of clergy. 2 East's C. L. 679.—But see the 52 Geo. III. c. 63. by which the species of embezzlement therein provided against is made a misdemeanor punishable with transportation, not exceeding fourteen years.

1803.

ASLETT'S CASE.

to felony by the law of England, &c. AND ENACTS, "That if any servant or clerk, to any person or persons *whomsoever*, or to any *body corporate* or politic, shall, by virtue of such employment, receive any money, &c. and shall fraudulently embezzle the same, &c. he shall be transported, &c. This enacting part, therefore, being general, "to any person or persons whomsoever," ought not to be confined by the preamble to "such servants" as are therein mentioned; and he cited the case of *Rex* v. *Marks* (1), where, although the preamble of the 37 Geo. III. c. 123. was confined to the administration of unlawful oaths in order to give effect to attempts to seduce persons from their allegiance, yet as the enacting part extended to the administering unlawful oaths, purporting to bind the person taking the same "not to reveal any unlawful combination or confederacy, or not to reveal any illegal act done or to be done," the administering an oath, purporting to bind the person taking the same not to divulge the secrets of an unlawful association of journeymen for the purpose of raising wages, was decided to be within the operation of the statute. So, in the present case, the words of the 39 Geo. III. c. 85. are sufficiently comprehensive to include the clerks and servants of the Bank; and if the statute 15 Geo. II. c. 13. had never passed, those servants might certainly have been indicted under the 39th of the King. And in the case of *Rex* v. *John Davis* (2), the Black Act, 9 Geo. I. c. 22. which makes the offence of hunting, wounding, killing, destroying, or stealing any red or fallow deer (*a*) in any park or other inclosed place where deer have been usually kept, death without benefit of clergy, it was decided that this punishment was virtually repealed by the 16 Geo. III. c. 30. which inflicts upon *the same offence* the punishment of transportation only (*b*). In this case, therefore, the 15 Geo. II. c. 13. having passed a particular law, subjecting the

(1) 4 East's Term Rep. 157.

(2) *Ante*, page 271. Case 135.

(*a*) See 2 East's P. C. 609. Rex *v.* Thomas Heath, at *Sarum*, March 1801, that no indictment lies for deer-stealing in the first instance; but that, although red or fallow deer only are mentioned, the Act extends to the cross breeds, such as what is called a Bastard Menald, bred from a menald buck and a fallow doe. See also the 42d Geo. III. c. 107.

(*b*) See the case of Rex *v.* Cator, 4 Burr. Rep. 2026.

servants of the Bank to a capital punishment, and the 39 Geo. III. c. 85. having passed a general law, upon *the same subject*, subjecting the offenders to transportation only, it is fair to infer that the Legislature intended to repeal the former punishment, and to permit the milder punishment inflicted by the latter Act to prevail in all cases of the like kind.

GILES, *for the Crown.* On the subject of the repeal, it is sufficient to say that the 39 Geo. III. c. 85. applies to a different species of offences than those which are described in 15 Geo. III. c. 13. The preamble of the former Act recites, that, at the time it passed, *doubts* were entertained whether the embezzling of such articles by such servants as are therein mentioned amounted to felony; but no doubt could be entertained as to the offences mentioned in the 15 Geo. II. c. 13. for the Act itself had expressly declared them to be felony without clergy. The sorts of property also mentioned in the two statutes are different. The 15 Geo. II. c. 13. makes it felony to steal any note, bill, *dividend warrant*, bond, *deed*, or other security intrusted to a Bank clerk; but the 39 Geo. III. c. 85. does not mention either dividend warrants or deeds, but refers only to money, goods, bonds, bills, notes, bankers' drafts, and other *valuable effects* and securities: The 39 Geo. III. extends also expressly to *Scotland*, which the former Act does not: the subject-matter, therefore, of the two Acts being different from each other, it cannot be fairly inferred that the species of punishment inflicted by the one was intended to be repealed by the other, especially when it is considered how much more important it is to the interests of the public that the property of THE BANK OF ENGLAND should be protected from the treachery of its servants, than that of private bankers or individual merchants. This circumstance alone is sufficient to support the inference, that the Legislature intended to make a distinction in the punishment of offences so distinct and different from each other. The 16 Geo. III. c. 30. was rightly held to repeal the similar clause in the 9 Geo. I. c. 22. for the former Act RECITES, that the good purposes of *all* the statutes then in force against deer-stealers, would be rendered more effectual if such as are found defective were *repealed*, and the provi-

1803. OCT. ASLETT'S CASE.

sions thereof reduced into *one Act*," and expressly repeals nine different statutes, from 12 Rich. II. c. 12. to 10 Geo. II. c. 32., but omits to mention the intervening statute of 9 Geo. I. c. 22.; it therefore could not be supposed that the Legislature intended that statute should remain in force; more especially as in both statutes the offence is described precisely in *the same words*. But in the present case the two statutes are two distinct and independent codes, both of which may stand without any inconsistency: a repeal, therefore, under such circumstances, cannot be legally presumed. This has been expressly decided in the case of *Rex* v. *Robinson* (1). As to the FIRST QUESTION, The papers described in this indictment are *effects* belonging to the Bank, for they are property of which the Governors of the Bank are the owners; and though they may not be, technically speaking, "securities," they are certainly "effects" of very great importance and of real value: they are important as documentary evidence to shew that the Bank have paid the seller of them the money which they purport to secure, and they are of a value commensurate to their importance in this respect. The word "effects" is not confined to any particular species of effects either in quality or in value: it is a word sufficiently comprehensive to include every denomination, large or small, of personal property, whether valuable or not. The statute does not make the embezzling the species of property therein described by the word "*effects*" *eo nomine*, A LARCENY; but, on the contrary, it makes the offender guilty of *a felony without benefit of clergy*. It creates a *new species of felony*, quite independent of the offence of *larceny* either at common law or by statute. A comparison of the language of the 15 Geo. II. c. 13. with that of 39 Geo. III. c. 85. will shew that the Legislature was actuated by different views and intentions in passing each of the statutes; the latter saying that every servant who shall embezzle his master's property contrary to the provisions of that Act, shall be deemed to have *feloniously stolen* the same from his master, which is a legislative declaration that the offence shall be considered as *a larceny* (2),

(1) *Ante*, page 749. Case 294. See also 2 East's C. L. 1115.

(2) So decided by the Judges in M'Gregor's Case, *ante*, page 962. Case 330.

1803.

ASHLEY'S CASE.

and will explain the reason why the Legislature added the words "or other *valuable effects*;" because unless the property so taken, be either in itself, or as a security, of sufficient value, the offence can not be *larceny*, nor the offender be deemed guilty of having feloniously stolen the same; but no such expression is to be found in the 15 Geo. II. c. 13. which shews the different objects for which these statutes were respectively made. The BANK ACT was made with a view completely to protect the Corporation of the Bank, amidst all its various and immense concerns, against the embezzlement of its servants as to all its property, of whatever nature or kind it might happen to be. It makes the embezzling "any deed," or "any dividend warrant," neither of which is mentioned in the Bankers' Act, a capital felony; the embezzling therefore of these particular articles, not being *a larceny* under the 39 Geo. III. c. 85. it must be *a felony* within 15 Geo. II. c. 13. So the embezzling of a power of attorney, which is *a deed*, would be within the Bank Act as *a felony*, but not within the Bankers' Act as *a larceny*. These differences shew the different objects the Legislature had in passing these two statutes. The preservation of every book, paper, and document of every kind, whatever may be its value, which belongs to the Bank, from the depredations of its clerks and servants, is of the highest importance to the interests of the public, although they are of no intrinsic value: a single sheet of paper may contain accounts of more consequence to the concerns of that Corporation than any securities they possess; and as to the observation respecting the absurdity of punishing capitally the embezzling of such very trifling articles as a piece of paper or an old pen, it may be sufficient to say, that *the felony* which this statute creates, can never be established until a felonious intent be clearly found.

LORD ALVANLEY, *Chief Justice*, at the Old Bailey February Sessions 1804, after stating the substance of the indictment, delivered the opinion of the Judges to the following effect. At the trial the counsel for the prisoner contended, that the bills stated in the indictment were not legal Exchequer Bills, they having been signed with the name of LORD GRENVILLE,

1808. ALLETT'S CASE.

the auditor of the Exchequer, by a *Mr. Jennings*, who had not been legally authorized to sign them for him, and that therefore they were of no value, notwithstanding they had been issued under the sanction of Government, as good and valid Exchequer Bills, and had, as such, been purchased, and paid for by the Governor and Company of THE BANK OF ENGLAND. The question therefore referred to THE TWELVE JUDGES was, whether these papers, which were issued as Exchequer Bills, are *effects* or *securities*, within the true meaning

16 Feb. 1804. of the statute 15 Geo. I. c. 13. Eleven of the Twelve Judges met in the Exchequer Chamber, on the objections that were taken at the trial, to hear the Counsel on these objections which were very fully and ably argued on each side. Great consideration has been given to the subject; the Judges have held many conferences upon the case; and it is now my duty to communicate the result of their mature deliberation on it. One of the points made by the prisoner's Counsel was, that admitting the offence charged to be of such a description as would be within the statute 15 Geo. II. c. 13. s. 12. yet that the prisoner could not be convicted under it, because that statute, as to the punishment inflicted by it, has been repealed by the 39 Geo. III. c. 85. (1); but on that point it is unnecessary for me to enlarge, as ALL THE JUDGES are clearly of opinion, that nothing is contained in the 39 Geo. III. c. 85. which can operate as a repeal of any part of the 15 Geo. II. c. 13. The more important question is, whether these papers, stated in the indictment to be effects and securities belonging to the Bank, can, in point of law, be considered as *effects* or *securities*, within the true meaning of the 15 Geo. II. c. 13. s. 12. Upon this question the Judges were not unanimous; but the majority are of opinion, that they are *effects* and *securities* within the true meaning of the Act. The clause is, "That if any officer or servant of the said Company, being intrusted with any note, bill, dividend warrant, bond, deed, or any security, money, or *other effects* belonging to the said Company, or having any bill, dividend warrant, bond, deed, or any security, or *effects* of any other person or persons, lodged or deposited with the said Company, or with him as an officer or servant of the said Company, shall secrete, em-

(1) See Beazely's Case, *ante*, page 835. Case 311.

1803.

ASLETT'S CASE.

bezzle, or run away with any such note, bill, dividend warrant, bond, deed, security, money, or *effects*, or any part of them, every officer or servant so offending shall be deemed guilty of FELONY, and suffer death, &c." In passing this Act the great and obvious object of the Legislature was to throw security and protection round THE BANK OF ENGLAND: its immense national concerns called on the Legislature for very special and very particular provisions in its favour: the views and principles of the Legislature therefore must be collected from the nature of the subject under consideration at the time the statute was past. The frame of any special and particular code or law, will of course be more comprehensive, when the subject relates to so vast a concern as that of THE BANK OF ENGLAND, than when it is applicable only to regulations concerning private individuals. But in searching for the true meaning of this statute, on the large and liberal principles on which it was framed by the Legislature, THE JUDGES disclaim all idea of straining any part of its words beyond their plain and natural import, more especially in a case like the present (1), where guilt is visited by so severe a penalty. In applying the circumstances of this case to the view and intention of the Legislature in passing the Act, the enormous weight of Exchequer Bills, and other securities which are constantly in circulation will be immediately recollected; and the protection which the public are clearly entitled to receive on this subject, will immediately occur to every mind. The papers in question had been regularly bought and paid for by the Bank as Exchequer Bills, and, by whatever name they may be called, or whatever they may be worth, have become the legal property of the Directors, by purchase for a valuable consideration. So far the case is clear and indisputable. It is said, however, that they cannot be legally considered either as *effects* or as *securities* within the true meaning of the statute; because although they are of a certain, they are not of any positive intrinsic value. But it is obvious the great object of the Legislature in framing the Act, was to protect every species of property, of every sort and kind, that the Bank could possess in its own right, or hold as the depositary of

(1) See 2 East, C. L. 574.

1803.

MILLETT'S CASE.

other persons, from the embezzlements of its officers or servants; and although these papers may not, from their defects as Exchequer Bills, bear any inherent legal value, yet they bear about them such consequence as make their preservation of great value and importance, not only to THE BANK OF ENGLAND in particular, but to the public in general. Viewing them therefore in that light, they have a real value: for although they certainly are not, in strictness of expression, Exchequer Bills, on account of the accidental irregularity in their original construction, yet the government of the country is pledged to pay them as good and valid Exchequer Bills, notwithstanding such defect. They were issued under the authority of parliament, and delivered as Exchequer Bills to their respective holders; the public have received the money they were designed to secure; the holders therefore have an indisputable claim on the public, founded not only in honour, but in justice, for the payment of them: it is a claim indeed so undeniable as to be equal to a right, and which must be admitted and satisfied, as punctually as if they had been perfect in every particular. They are therefore papers of value; they were issued as papers denoting that the holders were intitled to the monies which they purport to secure; the holders received them as such property; and they are, in the true meaning of the word, *securities*, available to any person who legally holds the possession of them. They are also *effects* belonging to the Bank. This word is of very comprehensive signification; it is not, in its legal acceptation, confined to any particular description of property, either in kind or in value; and was probably intentionally used by the Legislature, with a view to throw every possible protection round every possible species of property which the Bank could possess. But whether considered as effects, or securities, or mere papers, they are certainly valuable, for they give to the legal holder a right and title, which cannot be defeated, to call on government to pay the monies they were intended to secure. But further, this statute does not make the embezzlement of this species of property *a larceny*; which requires that the value of the thing stolen should be stated in the indictment,

on a prosecution of the offender; but the statute makes the offence now charged A FELONY, in the prosecution of which it is not necessary, that any value should be affixed, in the indictment to the property purloined. But if it were necessary, these papers are of themselves of such value, even in their defective states, that no man would hesitate to purchase them at the usual rate. They are indeed of such value, that if a bankrupt were possessed of them, he would be bound to deliver them over to his creditors as part of his estate and effects. An insolvent debtor could not retain them as not being effects, but must insert them in his schedule, and deliver them as valuable property to his assignees. An executor, who should find such papers among the property of his testator, would be compellable to pay the tax upon them, as a part of the personal estate coming to his hands, and would be liable to a *devastavit* if he were to destroy them: and many other cases might be put to shew that they are valuable effects. It was indeed argued, that if the word "effects," is to be taken, without any restriction, as a term of so comprehensive a signification, it would lead to the absurdity of ascribing value to things of so trifling a nature as a remnant of paper, or the stump of an old pen. But the Judges have not found themselves driven to the necessity of considering so extreme a supposition. They have carefully and attentively considered the words of the statute, in the sense and meaning in which it appeared to them, they were intended to be used by the Legislature; and they are of opinion, that the words "security or other effects," refer only to such securities and effects as are placed in the custody of, and intrusted to the care and confidence of the officers and servants belonging to the Bank; and under that character they conceive the papers or bills in the present case precisely fall. The defect in these bills must be remedied by the government of the country, for whose benefit they were originally issued; they have become the fair property of the Bank, by a *bona fide* purchase of them, for a valuable consideration, as securities for the repayment of the monies advanced on them. The MAJORITY OF THE JUDGES therefore are clearly of opinion,

1803.

ASLETT'S CASE.

1803.

ASLETT'S CASE.

that they are *valuable effects or securities*, within the true meaning of the 15 Geo. II. c. 13. s. 12. and that their embezzlement by the prisoner under the circumstances of the case, as being the servant of the Bank to whose care they were intrusted and confided, subjects him in fact and in law to the punishment which the statute has assigned to a conviction of the crime of which he has been found guilty.

CASE CCCXXXVII.

If a servant receive monies in *one county*, for the use and on account of his master who lives in *another county*, and does not account for it to his master, the offence of embezzling the money may be laid to have been committed in the county in which his master lives.

3 Bos. and Pull. New Rep. 596.

THE KING *against* WILLIAM TAYLOR.

AT the Old Bailey in October Session 1803, *William Taylor* was tried before MR. BARON THOMPSON, present MR. JUSTICE HEATH, on the statute 39 Geo. III. c. 85. for secreting and embezzling on 27th August 1803, the sum of ten shillings, the property of his master *James Barker*.

THE prosecutor, *James Barker*, a fishmonger in *Drury Lane*, in the county of *Middlesex*, sent the prisoner, his servant, on the 27th August, with one hundred herrings to *Mrs. Mary Stevens*, who lived in *Cross Street, Blackfriars Road*, in the county of *Surry*, and for which she paid the prisoner ten shillings on his master's account. On his return home he told his master that *Mrs. Stevens* had not paid him; and, after receiving his weekly wages, he left his service the same evening without accounting with him for the ten shillings he had so received. *Barker* did not discover the embezzlement until about three weeks after he had quitted his service, into which he expected that he would have returned on the ensuing Monday.

THE JURY found the prisoner guilty.

KNAPP, *for the prisoner*, contended that the offence was proved to have been committed in the county of *Surry*, and not in the county of *Middlesex*, for that the receipt of the money being in *Surry*, and no act being proved denoting even an intention to embezzle it in *Middlesex*, it must be taken that the whole offence was completed and ended in *Surry*.

1803.

TAYLOR'S CASE.

On this objection the case was saved for the opinion of THE TWELVE JUDGES.

Lord Alvanley, in the December Session following, delivered the opinion of the Judges to the following effect. This is not the first question which has arisen on the statute of 39 Geo. III. c. 85. respecting the place in which the offender ought to be tried for this offence. At the last Lent Assizes for *Shrewsbury*, *John Hobson* was tried before Mr. Justice Chambre, for receiving money by virtue of his employment, as servant to one *Thomas Heighway*, on account of the said *Thomas Heighway* his master, and fraudulently secreting, embezzling, and so stealing it; the said money being the property of his said master, in the county of *Salop*. The evidence was, that *Mr. Heighway*, the master, resided and carried on his trade at *Litchfield* in the county of *Stafford*; that the prisoner was his servant, living with him and assisting him in his business at *Litchfield*; that on Saturday morning 22d January 1803, the prisoner *Hobson* and his master were together at *Shrewsbury*; that *Hobson* after having authorized one *W. Beaumont* to collect certain debts for him at *Shrewsbury*, returned the same day to *Litchfield*, leaving *Hobson* at *Shrewsbury* to receive from *Beaumont* such monies as he might collect, and to return with them to *Litchfield* in the evening; which *Hobson* promised he would do; that *Hobson* received from *Beaumont* the monies mentioned in the indictment about noon on the same day, together with a letter for his master which had been left at *Beaumont*'s house; that he left *Shrewsbury* soon after he had so received the money and letter, but did not return to *Litchfield* until the night following, having slept that night at a public-house on the road. On his return home *Heighway* asked *Hobson* for the money he had received from *Beaumont*; but he denied having received any; sometime afterwards *Mr. Heighway* having received further intelligence, accused *Hobson* of having received the money and told him to go to *Shrewsbury* to clear himself; but *Hobson* still persisted that he had not received it, and on the Saturday following he went to *Beaumont*'s house at *Shrewsbury*, and desired him to make search on the left hand side of the

1 East's Crown Law, Addenda xxiv.

1803.

TAYLOR'S CASE.

room in which they had been; but no search was made; *Beaumont* telling him it was of no use to search, as he, *Hobson*, had received the money from him; and it was proved most clearly, by another servant, that he had so received it. On this the Jury found the prisoner guilty, and he received sentence; but as the prisoner's receipt of the money at *Shrewsbury*, his going thither afterwards to clear himself, and on that occasion desiring a search to be made for the money, as if he had left it there, were the only acts appearing to be done in *Shropshire*, the case was saved on the following questions: FIRST, whether, under this statute, an indictment might not be found and tried, in the county where the money or goods were received, although there were no evidence of any other fact locally arising within the same county. SECONDLY, whether, if further local proof were necessary, the subsequent conduct of the prisoner at *Shrewsbury*, was not sufficient to obviate the objection as being an act in furtherance of the purpose of secreting or embezzling. In the Easter Term following, the Judges were of opinion that the trial was properly had at *Shrewsbury*. Most of them thought that as in the case of larceny at Common Law, so in this, where the statute declared the offence to be of *the same kind* (1), the subsequent conduct of the prisoner, in not accounting to his master, and denying the receipt of the money, was evidence to shew that the original taking was with intent to secrete and embezzle, and so to steal within the meaning of the statute, and the more so as the act of secreting was a negative act: and some of the Judges considered that the offence *was triable in either county*, as referable to the original taking in one, and the not accounting, but denying the receipt, when called upon, in the other.—In that case there was very strong evidence of the prisoner's intention to embezzle the money; and, by fair inference, of his having carried that intention into execution in the county of *Salop*, for although, as it was said, the not accounting for it arose in the county of *Stafford*, until which time the offence was not completed; yet when that took place, it disclosed the intent with which the money had been received, and rendered the embezzlement of it in the same

(1) See Mc. Gregor's case, *ante*, page 932. Case 330.

county complete. If however there were any doubts upon that case, none whatever can possibly exist upon the present. The facts are these. At six o'clock on Saturday evening the prisoner was sent by his master into the county of *Surry*, where he received the ten shillings on his master's account: this receipt was perfectly legal, and there was no evidence whatever that, until he came to account with his master, he had ever come to a determination to appropriate that money to his own use; so that there is not either expressly or impliedly any proof of his having done any act by which he could have embezzled his master's money before he came into the county of *Middlesex*. The nature of the thing embezzled in the present case ought not to be laid out of the consideration, because the receipt of money is not like the receipt of other kinds of property, which must be identically delivered, where the attending circumstances may be such as plainly denote an intention to steal: for instance, suppose a servant were to receive a horse and sell it in the same county, the offence would unquestionably be complete in that county; but in the instance of receiving money it is not necessary that the servant receiving it, should deliver to his master the identical pieces he received; he may have had lawful cause to part with them; and if he account with his master for *the amount* he has received, it is all the law, in such case, requires. But there was, in this case, no evidence of his having paid away the money or spent it in the county of *Surry*. The only evidence of any act in that county was the receiving of the money, which was a legal act, for he was authorized so to do by his master; but when he came into the county of *Middlesex*, instead of accounting in any way for the ten shillings, he denied having received it, and ran away: the time and place therefore, when and where he was called upon and refused to account for it, was the only time and place at which the Jury could say he had determined to secrete and embezzle the money. Therefore without going further into this case, which I would do if any doubt could possibly be entertained about it, I shall only observe that there was no evidence either express or implied of his having

1803.

TAYLOR'S CASE.

1803.

TAYLOR'S CASE.

done any act denoting an embezzlement of the money, or of any act by which this offence could be completed, until he denied the receipt of it to his master in the county of *Middlesex*. The Judges therefore are unanimously of opinion, that offence was triable in that county, and that the conviction is right.

CASE CCCXXXVIII.

If a person knowingly deliver a forged bank-note to another person, for the purpose of its being knowingly uttered by such other person, who utters it accordingly, the deliverer of such note may be convicted of having "*disposed of, and put away*" the said note, on the 15 Geo. II. c. 13. s. 11.

S.C. 1 Bos. and Pull. New Rep. 96.

THE KING *against* PALMER AND HUDSON.

AT the Old Bailey in February Session 1804, *John Palmer* and *Sarah Hudson* were indicted on the statute 15 Geo. II. c. 13. s. 11. and tried before MR. JUSTICE LE BLANC, present MR. BARON HOTHAM, for uttering a forged bank-note, on 21 January.

THE statute enacts, "That if any person shall *offer, or dispose of, or put away* any forged or altered bank-note, or demand the money therein contained, or pretended to be due thereon, or any part thereof, of the Bank, or any of its officers or servants, knowing such bank-note to be forged or altered, with intent to defraud the Bank, or any other person or persons whatsoever, every person or persons so offending shall suffer death without benefit of clergy."

THE INDICTMENT consisted of eight counts. THE FIRST COUNT charged, that on the twenty-first January in the forty-fourth year, &c. *John Palmer* and *Sarah Hudson* feloniously did forge and counterfeit a certain bank-note, the tenor of which is as follows, (setting forth a note purporting to be a bank-note for the payment of two pounds,) with intent to defraud the Governor and Company of the Bank of *England*. THE SECOND COUNT charged, that THEY feloniously did *dispose of*, and *put away* a certain forged and counterfeit bank-note, the tenor of which, &c. (setting it forth) with the like intent, they well knowing the said note to be forged and counterfeited, against the statute. THE THIRD COUNT was the same as the first, only calling the forged note, a promissory note for the payment of money. THE FOURTH COUNT was for uttering

and publishing a promissory note for payment of money, as true with the like intent, they knowing it to be forged. The FOUR OTHER COUNTS were the same as the four former, only stating the intent to be to defraud *John Shaw*.

THE EVIDENCE.—On Saturday 21st January 1804, *Sarah Hudson* went to the shop of *Mr. Shaw*, a linen-draper, No. 91, *Newgate Street*, and purchased two muslin handkerchiefs for six shillings, for the payment of which she offered the note in question, by giving it into the shopman's hand. The shopman suspecting, from its general appearance, that it was forged, told *Mrs. Hudson*, that he should send it to the Bank, to which she objected, saying, "No, give it me again; I know where I took it: and I will take it to the person again and get it changed." The shopman however sent a person with it to the Bank, where it was stopped as a forged note. *Sarah Hudson* left the shop at the same time with the man who went to the Bank, and returned again between 8 and 9 o'clock in the evening, accompanied by the other prisoner *John Palmer*, who said, "This woman has been here to-day and offered a two pound note; it is my note that you have got; and I must have the note back or the change;" but *Mr. Shaw* sent for a constable, and apprehended both the prisoners. On going to prison the constable heard the prisoner *John Palmer* say to *Mrs. Hudson*, "Where did you get *this* note?" to which she replied, "You gave it me, and a great many more." The note was proved to be forged; and it appeared that the prisoner *Palmer* had been long in the habit of knowingly uttering forged Bank-notes, through the medium and by the assistance and agency of *Sarah Hudson*, and that he had actually employed her on this occasion to dispose of this note, while he waited at a house in the Old Bailey to receive the produce of her success; and it also appeared that *Sarah Hudson* well knew the notes were forged which she so put off.

ALLEY, *for the prisoner*, objected that the evidence related to two distinct offences, and not to one joint offence, and that it went to shew that *John Palmer*, if he was guilty at all, could only be guilty as an *accessary before the fact*,

1804.

PALMER AND HUDSON'S CASE.

and ought to have been so indicted instead of being, as in this case, charged as *a principal*, which he cannot be in construction of law, as he was not present either actually or constructively, when *Sarah Hudson* uttered this note to *Mr. Shaw*.

THE COURT left it to the Jury to determine, whether *Sarah Hudson* had uttered the note to *Mr. Shaw*, clearly knowing that it was a forged note, or whether *Palmer* had *disposed of it, and put it away to Sarah Hudson*, without any knowledge on her part that it was forged, telling them that they could not, upon the charge in the present indictment, find both the prisoners guilty of knowingly uttering the note; for that *John Palmer* could not be guilty, unless they were of opinion that he had knowingly uttered the note to *Sarah Hudson*, as an innocent instrument or mean of converting to his own use the produce of the forged note: and that *Sarah Hudson* could not be convicted unless they were of opinion that she had *disposed of and put away* the note, knowing at the time that it was a forged note. The Jury found *John Palmer* guilty of having knowingly uttered this note to *Sarah Hudson*, and acquitted *Sarah Hudson*.

BUT the question was saved for the opinion of the Judges, whether the evidence given legally supported the conviction of *Palmer*.

MR. JUSTICE ROOKE, at the Old Bailey in July Session 1804, delivered the opinion of the Judges to the following effect: You *John Palmer* was tried in February Session last, on an indictment which charged that you and one *Sarah Hudson* did, on the 21st January 1804, feloniously utter and publish as true, a false, forged and counterfeited bank-note, for the payment of two pounds: and another count charged you with having knowingly disposed of, and put away the same against the statute 15 Geo. II. c. 13. s. 11. MR. JUSTICE LE BLANC has reported to the Judges, that it was clearly proved that you was in the habit and practice of uttering and putting off forged bank-notes, and of employing the other prisoner, *Sarah Hudson*, for the purpose of carrying this practice into effect, and that in particular you had employed her to dispose of the very note which was the subject

1804.

PALMER AND HUDSON'S CASE.

of the indictment, you being in waiting at a place in the Old Bailey, while she was so employed by you, for the purpose of receiving the produce of the said forged note; all which you admitted by what you said at the shop of *Mr. Shaw*, when you went there in the evening, and demanded the money or the return of the note. On this evidence the learned Judge submitted two questions for the consideration of THE TWELVE JUDGES. The FIRST is, whether the evidence supported the conviction on the count for uttering and publishing the note as a true note, knowing it to be forged. The SECOND is, whether the evidence is sufficient to prove that you *John Palmer* feloniously disposed of, and knowingly put away the forged note to *Mrs. Hudson*. On the first question it seemed to be the general opinion of the Judges, that if *Sarah Hudson* had been innocent and had not known that the note was forged, the delivery of it by you *John Palmer* to her, would have been a guilty uttering of it by you, according to the doctrine of MR. JUSTICE FOSTER, that when an innocent person is employed for a criminal purpose, the employer must be answerable; but it appeared at the trial that *Sarah Hudson* knew the note was a forged note, and therefore the Judges have formed no opinion on the first question, as applying to the first count for *uttering and publishing* it as true, knowing it to be forged, thinking it sufficient to consider the case upon the second count: the question with respect to which is whether the facts here stated amount to a *disposing of and putting away*, within the meaning of 15 Geo. II. c. 13. s. 11. Upon this point there has been a difference of opinion among the Judges. Some of them held that this is not an offence within the statute, because, until *Sarah Hudson* uttered the note to *Mr. Shaw*, it ought to be considered as virtually in your possession, and that when she did utter it, you was only an *accessary before the fact*, and should have been so indicted. But the majority of the Judges, of whom I am one, are of opinion that the conviction is right. Constructive possession is a fiction of law, and only signifies that though the actual possession may be in one person, the constructive possession may be considered in another; and these fictions being en-

Foster's Crown Law, 349. 1 Hale, 616.

See the Case of Rex *v.* Holden and others, *post.*

1804.

PALMER AND HUDSON'S CASE.

tertained, merely for the purpose of obtaining the ends of justice, they ought not to be defeated when that is their object. It clearly appeared in this case that you knowingly delivered this forged note into the hand of *Sarah Hudson*, for the fraudulent purpose of uttering it for your use. You could not have recovered it back by any action at law; it was out of your legal power; and when it was actually uttered by her, she had effected the purpose for which you had delivered it to her, and the note was *disposed of, and put away* by you through her means. The question therefore is, what offence the Legislature intended to prevent by the 11th Section of the 15 Geo. II. c. 13. the words of which are, "That if any person or persons shall forge, counterfeit, or alter any bank-note, &c. or shall offer or dispose of, or put away any such forged, counterfeited or altered note, or demand the money therein pretended to be due thereon, knowing such note, &c. to be forged, counterfeited or altered, with intent to defraud, &c. every person or persons so offending shall be guilty of felony without clergy." If the intention of the Legislature be clear, the consideration of a constructive possession in you does not appear of sufficient weight to restrain the ordinary construction of the words of the statute: "if any person shall *offer, or dispose of, or put away* any forged note, &c." Now uttering was a capital offence by a former statute (1), and as delivering an instrument to another is a step towards uttering it, it seems most consonant to the intention of the Legislature to hold that a delivery to another for a fraudulent purpose, is an offence within the words "*dispose of or put away.*" For these reasons a very considerable majority of the Judges are of opinion, that the conviction is right upon the second count, for disposing of and putting away this note.

See 45 Geo. III. c. 89. Starkie's Criminal Pleadings, page 487.

(1) 2 Geo. II. c. 25. 7 Geo. II. c. 22.

1804.

THE KING *against* SARAH WHILEY AND ANN HAINES.

CASE CCCXXXIX.

To prove the *guilty knowledge* of an utterer of a forged bank-note, evidence may be given of his having previously uttered other forged notes knowing them to be forged.

S. C. 1 Bos. & Pull. New Rep. 92.

AT the Old Bailey, in April Session 1804, *Sarah Whiley*, otherwise *Evans*, and *Ann Haines*, otherwise *Foss*, were tried before MR. JUSTICE HEATH, present MR. BARON THOMPSON, on an indictment containing eight counts, charging them, FIRST, with forging a two-pound bank-note on the 12th March, 1804; SECONDLY, with feloniously offering, disposing of, and putting away a forged note; THIRDLY, with forging a promissory note for the payment of money, in the *form of a bank-note*; FOURTHLY, with uttering it knowingly; and four other counts, with intention to defraud, *First*, the Bank of England, and, *Secondly*, *John Hind*.

THE two prisoners, on the 12th March 1804, went together into the shop of Mr. *Hind*, an ironmonger, No. 134, *Whitechapel*, and purchased a brass footman for four shillings, for which *Whiley* offered the note in question to pay for it; but on its being communicated to them that it was suspected to be a bad one, they both affected great surprise, and produced a good note, and paid for the article out of it. Being, however, questioned as to where they lived, and from whom they had received the first note, they prevaricated, and gave in not only false names, but false addresses to their residence. The note and the prisoners were therefore stopped by Mr. *Hind*'s journeyman, who told them they must go with him to the Bank, which they refused to do, and they were taken into custody on suspicion that they had offered it *knowing* it to be forged; but, to make this fact more clear,

THE COUNSEL *for the Crown* offered evidence that the prisoners had, on 13th February 1804, uttered a forged two-pound note to Mr. *Jones*, cheesemonger, No. 7, *Cow-lane*; another on the 25th February to Mr. *Findle*, of *Brewer-street*, *Golden-square*; another on 28th February to Mr. *Corder*, grocer, *Broad-street*, *Bloomsbury*; and that on being

1804.

WHILEY AND HAINES'S CASE.

asked, at each place, for their names and places of abode, they gave false names and false addresses.

KNAPP and ALLEY, *for the prisoners*, objected to this evidence. They contended that the facts now offered in evidence would, if true, constitute three distinct and independent charges of felony; and that it was a settled rule of law, that no testimony could be given of any fact not relevant to, or connected with the specific charge in the indictment, which was the only charge of which the prisoners had notice, or against which they were in any way prepared to defend themselves. That in indictments of burglary or robbery, the Court never suffered other burglaries or other robberies, previously committed by the same person, to be given in evidence for the purpose of shewing that the act charged to have been done, was done by the prisoner intentionally and with a guilty mind. Even upon an indictment analogous to the present, for uttering bad money, the proof is always exclusively confined to the particular uttering charged in the indictment; and that the offences of knowingly uttering counterfeit coin and forged bank-notes were so similar to each other, that no reason could be assigned why any distinction should be made between them as to the rules of law, or why an established principle should prevail in the one case and not in the other; a departure from which would manifestly tend, by introducing transactions foreign to the charge, to confound and perplex prisoners in their defence; and that for this reason it had always been usual to quash an indictment for a misdemeanor, if there were several misdemeanors included in it.

GARROW, FIELDING, GILES, and BOSANQUET, *for the Crown*, were stopped by the Court.

LORD ELLENBOROUGH, *Chief Justice*.—Certainly the same rules of law must prevail, whether the prosecution be at the instance of the Bank of England, or be instituted by private persons; but the point now made has been already discussed and settled by THE TWELVE JUDGES in *Tattershall's Case*, be-

1804.

WHILEY AND HAINES'S CASE.

fore MR. JUSTICE CHAMBRE at *Lancaster*, in the year 1801, and reserved by him for the opinion of the Judges. It was an indictment for forging and knowingly uttering a bank-note, and the question was, whether the prosecutor, in order to shew that the utterer *knew* it to be forged, might give the conduct of the prisoner in evidence for the purpose of proving his knowledge of the forgery; that is, whether from the conduct of the prisoner on one occasion, the Jury might not infer his knowledge on another; and the Judges were of opinion that the Court was authorized by law to receive such evidence. The observations respecting prisoners being taken by surprise, and coming unprepared to answer or defend themselves against extrinsic facts, is not correct. The indictment alleges that the prisoner uttered this note *knowing* it to be forged, and they must know that, without the reception of other evidence than that which the mere circumstances of the transaction itself would furnish, it would be impossible to ascertain whether they uttered it with *a guilty knowledge* of its having been forged, or whether it was uttered under circumstances which shewed their minds to be free from that guilt. I remember the case of a person who came to *Manchester* with a large parcel of forged notes; and the circumstances of his whole conduct afforded strong evidence of the intent and purpose with which he went there; and a question was made, whether these circumstances might be given in evidence; for it was said that this would be trying the prisoner for other utterings than those charged in the indictment; but if several and distinct offences do so intermix and blend themselves with each other, the detail of the party's whole conduct must be pursued. There is a case where a man committed three burglaries in one night, and stole a shirt at one place and left it at another; and they were all so connected that the Court heard the history of the three different burglaries. True it is, that the more detached the previous utterings are, in point of time, the less relation they will bear to the particular uttering stated in the indictment; and when they are so distant, the only question that can be made is, whether they are sufficient to warrant the Jury in making any inference from them as to the *guilty knowledge* of the pri-

1804.

WHILEY AND HAINES'S CASE.

soner; but it would not render the evidence inadmissible.—Circumstances of this kind may produce such strong evidence as to leave no doubt as to the prisoner's knowledge that these notes were forged. I am therefore of opinion, under the authority of the cases I have stated, that it is competent for the Court to receive evidence of other transactions, though they amount to distinct offences, and of the demeanor of the prisoner on other occasions, from which it may be fairly inferred that he was conscious of his guilt while he was doing the act charged upon him in the indictment; and if this species of evidence do not warrant such an inference, it will be laid out of the case.

MR. JUSTICE HEATH.—The case of *Rex* v. *Tattershall* has already decided this question. No person can be punished for an offence until he has been regularly charged with, and convicted of it. The charge in this case puts in proof the *knowledge* of the prisoner; and as that knowledge cannot be collected from the circumstances of the transaction itself, it must necessarily be collected from other facts and circumstances. I remember a case where several persons were indicted for a conspiracy to raise wages, and on the trial evidence was received of circumstances, which, taken by themselves, amounted to substantive felonies; but as these circumstances were material to the point in issue, they were admitted in evidence.

MR. BARON THOMPSON.—I am of the same opinion. The case of *Rex* v. *Tattershall* is exactly in point. As to the case put by the prisoner's Counsel, of uttering bad money, I by no means agree in their conclusion, that the prosecutor cannot give evidence of another uttering *on the same day* to prove the guilty knowledge. Such other uttering cannot be punished until it has become the subject of a distinct and separate charge; but it affords strong evidence of the knowledge of the prisoner that the money he uttered was bad. If a man utter a bad shilling, and fifty other bad shillings are found upon him, this would bring him within the description of a *common utterer*; but if the indictment do not contain that charge, yet these circumstances may be given in evi-

dence on any other charge of uttering, to shew that he uttered the money with a knowledge of its being bad. 1804.

WHILEY AND HAINES'S CASE.

THE COURT, therefore, received the evidence objected to, and the prisoners were both found guilty (*a*).

(*a*) At the Summer Assizes at Lewes, 1807, *Edward Ball* was tried before MR. JUSTICE HEATH on the 48 Geo. III. c. 89. for *knowingly* disposing of and putting away a forged bank-note. It was proved to be a forged note, and that the prisoner had uttered it on the 17th June preceding. To prove that he uttered it *knowingly*, evidence was offered that he had uttered another forged note of the same manufacture on the 20th March preceding, and that, between December 1806 and March 1807, various forged notes, of the like kind, had been paid into the Bank with different indorsements on them in the *hand-writing of the prisoner*, and that paper and implements fit for making such notes were found in his possession.—The Court received the evidence, and the prisoner was found guilty; but the case was saved for the opinion of the Judges, and at the Lent Assizes, 1808, MR. JUSTICE HEATH said, "The Judges are all of opinion that the evidence was admissible." 1 Campbell's Rep. 325. So in the case of Rex *v.* Roberts and others, who were charged, that being persons of evil fame, and in low and indigent circumstances, they conspired together to cause themselves to be reputed persons of considerable property and in opulent circumstances, for the purpose of defrauding A. B. LORD ELLENBOROUGH allowed the prosecutor to give evidence of various acts, such as their having hired a house in a fashionable street; of their having represented themselves, at different times, to different persons, to be people of large fortune: for that being charged as common cheats, cumulative instances are necessary to prove the offence. 1 Campbell's Rep. 400.

1805.

CASE CCCXL.

THE KING *against* BENJAMIN CROCKER.

AT the Summer Assizes at *Salisbury*, 1805, *Benjamin Crocker*, otherwise *Benjamin Collins*, was tried before MR. JUSTICE LE BLANC for forgery.

1. A person whose name is forged cannot be admitted to say that an indorsement on it, purporting to be a memorandum of interest paid on it *is not his hand-writing*. 2. The finding a forged bill in the custody of a person is no evidence that it was forged in the county where it was found, though under circumstances of great suspicion. 3. A person may be convicted of forging with intent to defraud, although the note was found in his custody when apprehended, and never in fact uttered by him; *sed quære*.—S. C. 2 Bos. & Pul. New Rep. 97.

THE INDICTMENT stated, That he, *Benjamin Crocker*, on the 1st April, 1805, at the parish of *St. Edmund*, in *New*

1805.

CROCKER'S CASE.

Sarum, feloniously did falsely make, forge and counterfeit, and procure to be falsely made, forged and counterfeited, a certain promissory note for the payment of money, as follows:

"ON DEMAND, I promise to pay Mr. *Benjamin Crocker*, or order, the sum of SEVENTY POUNDS, with lawful interest for the same.

VALUE RECEIVED this seventh day of March,

WILLIAM TUCKER.

with intent to defraud one *William Tucker*, against the statute, &c.: and there was A SECOND COUNT for *uttering* the said note, knowing it to be forged.

THE EVIDENCE.—The prisoner had formerly lived at *Winsham*, in the county of *Somerset*, where he followed the employment of a farmer for many years. About the month of June 1804, he quitted his farm and all his concerns at *Winsham*, at which place the *William Tucker*, in whose name the forged note purported to be signed, resided, and also carried on the farming business there at the time of the trial. In November, 1804, the prisoner, having changed his name from *Crocker* to *Collins*, went with his wife to *Salisbury*, where he took lodgings and continued to live until about the middle of the month of May, 1805, when he left his wife at her apartments in *Salisbury*, and went to *London*. During his stay in *London*, he was apprehended there on another charge; in consequence of which his lodgings at *Salisbury* were searched in the presence of his wife; he being still in *London*; and in a bureau belonging to the prisoner was found a pocket-book, in the inside of which was written his name, *B. Crocker*, in his own hand-writing, and in one of the pockets of this pocket-book was found THE NOTE stated in the indictment. It was proved that the whole of this note, that is, the body of it, and also the signature, "*William Tucker*," was the hand-writing of the prisoner, although the signature seemed, on a transient view of it, to be the hand-writing of a different person; on the back of it was written, "*Mr. Wm. Tucker* 70*l. one year's inte* *paid* 3*l.* 10*s.* B.

1805.

CROCKER'S CASE.

CROCKER." This indorsement was also proved to be the hand-writing of the prisoner, and the note was written on a proper promissory note stamped for the value of seventy pounds. In the same pocket-book was also found at the same time another promissory note of 100*l.* payable to the prisoner or order, and purporting to be signed by one *William Gapper*; on the back of which note was also written, *in the prisoner's hand-writing*, "Mr. Wm. Gapper, sen. 100*l.*" On the trial, the *William Gapper*, to whom the signature of this note alluded, was admitted as a witness, to prove that the signature "*Wm. Gapper*" was not his hand-writing, and that he never owed the prisoner any money in his life. The *William Tucker* also, whose name purported to be signed to the note stated in the indictment, was admitted a witness to prove the falsity of the indorsement on it, namely, that he had never paid the prisoner 3*l.* 10*s.* for interest on this or any other note; but he was not examined as to the hand-writing of his name.

THE COUNSEL *for the prisoner* contended, FIRST, That the note signed *William Gapper* ought not to have been received in evidence, and that neither *Gapper* nor *Tucker* were competent witnesses to invalidate these respective notes. SECONDLY, That there was not any evidence to shew that any offence had been committed in the county of *Wilts*, the prisoner not being in *Wiltshire*, but in *Somersetshire*, at the time when the note appeared to bear date. THIRDLY, That the note having been kept in the prisoner's possession, and never uttered, or attempted to be made any use of, there was no evidence of any intent to defraud.

THE LEARNED JUDGE, however, was of opinion, ON THE FIRST POINT, That the testimony of both *Gapper* and *Tucker* might, under the circumstances of the case, be legally received as to the particular facts which they were respectively called to prove. SECONDLY, That the fact of the note being found in the prisoner's lodgings in *Wiltshire*, where he had resided for some months, was evidence on which the Jury might consider, whether it had or had not been fabricated there. THIRDLY, That the fact whether the note had been made in-

1805.

CROCKER'S CASE.

nocently, or with an intent to defraud, was also a question for the consideration of the Jury, under all the circumstances of the case,

THE JURY found the prisoner guilty; but the case was reserved for the opinion of THE TWELVE JUDGES on the three objections above stated; and it was appointed to be argued in the Exchequer Chamber, on Saturday, 23d November, 1805; but the argument was postponed to the 30th, when it came on at Serjeants'-Inn Hall, by SERJEANT LENS for the prisoner, and by MR. PELL for the Crown, before eleven of the Judges, SIR JAMES MANSFIELD, C. J. being absent.

MR. SERJEANT LENS, *for the prisoner*.—FIRST, The note which the indictment charges the prisoner with having forged, is that which purports to be signed "*William Tucker*," with which the note purporting to be signed "*William Gapper*," has no connection whatever, except that of having been found in the same pocket-book. No evidence, therefore, of or concerning this latter note ought to have been received, for no inference can arise or be legally drawn that the one note was forged by the prisoner, because the other note was found at the same time and in the same place. In cases where the question is, whether a forged note was knowingly uttered, other forged notes found at the time in the prisoner's possession may be given in evidence, as proof that the uttering was made with a knowledge of the forgery; but here the sole question is, whether the prisoner forged this identical note, which cannot be legally proved by evidence that he forged a different note. The testimony of *Tucker* also ought not to have been received, as to any facts which might in their consequences tend to destroy the validity of an instrument, on which, if genuine, he would have been liable to an action. The question here is, whether this is or is not the note of *William Tucker*, and it is clear that he cannot, by the established rule of law, be admitted to say directly that this signature is not his hand-writing (1). And if he be incompetent in this respect, upon what legal principle can

See Whiley's Case, page 983. Case 339.

(1) See this point adjudged accordingly by Lord Ellenborough, C. J. in REX *v.* Boston, 4 East's Term Rep. 582. See also Captain Smith's Case, 2 East's C. L. 1001; and 2 East, ch. 19. c. 62.

1805.

CROCKER'S CASE.

he be allowed to prove that so important a part of the note as its indorsement is forged? The disability of this witness as to the signature must apply equally to every part of the note by which its validity may be affected; and if an action were hereafter to be brought upon it, it appears by the case of *Searle* v. *Barrington* (1), that the indorsement might be given in evidence to establish its validity: a witness cannot be permitted to do that indirectly which he is disabled by law from doing directly; and evidence to falsify the indorsement is, in its immediate effect, precisely the same as if he had been allowed to deny the signature to be his hand-writing. It is said by Mr. East (2), "Incompetency, arising from interest in the event of the verdict, where it really exists, extends to preclude the party from giving *other evidence*, as well as that of *negativing the hand-writing* which tends to prove the fact of the forgery;" for which purpose he cites the case of *Rex* v. *Bunting* (3), where the executor of a person whose promissory note had been forged, was, by MR. BARON ADAMS, rejected as a witness to prove what the prisoner had said to him when he tendered him the note for payment.—SECONDLY, The only circumstance from which any inference can be drawn of an offence committed in the county of *Wilts*, is the finding the pocket-book there in which this note was contained: the note is dated the 7th March, 1803; but on that day both *William Tucker* and the prisoner were residing in the county of *Somerset*: so far, therefore, as these facts are material, they tend to shew that this forgery was committed in *Somersetshire*, and there is no fact whatever of any fabrication in *Wiltshire*. Much reliance, perhaps, cannot be placed upon the date of a forged instrument; but if the mere circumstance of finding this note in *Wiltshire* be sufficient to shew that the forgery was committed in that county, it would follow, that if the prisoner had taken it with him to *London*, or into any other county, he might have been indicted in any county where it happened to be found. The act constituting the offence must be connected in some way with the *place* in which the offender is tried (4), for the *place* where it is committed is matter of substance. By the Com-

(1) 2 Str. 826.

(2) 2 East's Crown Law, 996.

(3) Rex v. Bunting, Thetford, March 1767, from Serjeant Forster's MS.

(4) See the Case of Thomas Thomas, *ante*, page 634. Case 275.

1805.

CROCKER'S CASE.

mon Law, if a person were mortally wounded in one county and died in another, the offender could not be indicted in either county, until the statute 2 & 3 Edw. VI. c. 24. s. 2. directed that, in such case, the trial should be where the death happens; nor could the offences mentioned in 28 Hen. VIII. c. 15. if committed upon the high seas, be tried before that statute in any jurisdiction: and so it was as to all offences committed out of the body of any county, until the statute 39 Geo. III. c. 37. which declares that *all offences* committed upon the high seas, out of the body of any county, shall be liable to the same punishments as if they had been committed upon the shore, and tried as directed by 28 Hen. VIII. c. 15. In the case of *Parkes* and *Brown* (1), where *Parkes* had forged the note in question, and given it to *Brown*, who uttered it in the county of *Middlesex*, in which county the *venue* was laid, and in which county *Parkes* also was, but not present at the time the note was uttered, it was decided that this finding of the forged note in the hands of *Brown*, in the county of *Middlesex*, was no evidence of the note having been forged by *Parkes* in that county, though other notes of the like kind were found upon him (2). In the present case it is not incumbent on the prisoner to prove that the offence was not committed in the county of *Wilts*, but it is incumbent on the prosecutor to shew that it was in fact committed in that county.—THIRDLY, The evidence of the intent to defraud must arise from the proof of some act done by the prisoner himself, denoting that such an intention existed in his mind at the time the act is done; but in this case the note was never uttered by any person, nor was any act done by the prisoner to shew even that he ever designed to utter it.—The object he had in making this instrument, or the manner in which he intended to use it, cannot be satisfactorily inferred from any of the circumstances of this case. There is nothing to shew that he had in contemplation some future moment in which he might have the opportunity of making a fraudulent use of it; but if such an inference could be fairly made, the fact is, that he has never attempted to utter it. The note being dated so far back as March 1803, and being made payable on demand,

(1) *Ante*, page 775. Case 299.

(2) 2 East's P. C. 992.

are circumstances more likely to create distrust than confidence, and certainly would have enhanced the difficulty of any attempt to circulate it: its date, if true, shews that he had no immediate intention to use it: it is not contrived to serve a present purpose: and if it was a more recent fabrication than its date imports, it is not to be imagined that he would have put so distant a date to it, if he had intended to pass it immediately away. The inference therefore is, that the prisoner, in this instance, had no intent to defraud.

PELL, *for the Crown*, argued, as to THE FIRST objection, That the receiving of the 100*l.* note in evidence, and allowing *William Gapper* to prove that the signature to it was not his hand-writing, was perfectly legal; for the testimony he gave afforded very satisfactory proof of the disposition of mind and of the sort of talent which the prisoner possessed as to the probability of his having forged the note stated in the indictment. The inquiry, at the trial, was, whether the prisoner had forged this note in the county of *Wilts*, with *intent* to defraud *William Tucker*; and in *Rex* v. *Whiley* (1), upon an indictment for forgery, it was clearly held, that concomitant acts done by a prisoner may be given in evidence to shew his knowledge of the forgery; as his having uttered other forged notes of the like kind and description. The same rule prevails in cases of uttering counterfeit coin of a particular denomination; for, in such cases, evidence may be given of the prisoner having uttered counterfeit coin of another denomination. The principle of the rule is the same, whether it be applied to the discovery of the guilty intent in uttering a forged note, or to the guilty act of having forged it. As TO the question respecting the testimony of *William Tucker*, it must be admitted that he was not a competent witness to prove that the signature was not his hand-writing. The practice upon this subject is now so established that it cannot be controverted; but the rule goes no further than to prevent him denying the signature; and as it is a practice not analogous, but quite repugnant to the general principles of the law of evidence, it ought to be strictly restrained within the precise limits to which it has been con-

(1) *Ante*, page 988. Case 339.

1805.

CROCKER'S CASE.

(1) East's P. C. 996.

(2) *Ante*, page 434. Case 201.

(3) *Ante*, page 438.

(4) *Ante*, page 175. Case 90.

(5) *Ante*, page 775. Case 299.

fined. As to the case of *Rex* v. *Bunting* (1), the testimony of the executor was properly rejected, for it went to the very gist of his interest; but in *Rex* v. *Parr* (2), who had personated *Isaac Hart* a proprietor of stock, and forged his name on receiving a dividend, *Isaac Hart* was admitted to prove the amount of the stock which he had at the Bank, and that the sum of 58*l.* 10*s.* was due to him for half a year's dividend thereon; but he, like *Tucker*, was not examined as to the falsity of the signature (3). Besides *Tucker*, in this case, was not within the reason of the rule; for it has been said, that there is no necessity to call the person whose name is forged, since that fact is capable of being proved by other persons; but no one but *Tucker* himself could have proved that *he* had not paid the interest indorsed on the note: Indeed he was completely competent to prove that fact; for, by denying that he had ever paid any interest thereon, he made himself liable to pay it if the note should afterwards appear to be genuine: he had therefore no interest as to that subject in the event of the verdict. SECONDLY, he argued, that the fact of finding this forged note in the prisoner's custody in the county of *Wilts*, was evidence to go to the Jury of the offence having been committed in that county. In the case of *Rex* v. *Elliot* (4), the forged note was found upon the prisoner in the county of *Kent*, and he was tried at *Maidstone*, and convicted in that county, though no other evidence whatever was given to shew that it had been actually fabricated there. On the contrary, the circumstances of the case rendered it highly probable that it was not; for it appeared that the plate and the paper, from and on which the note was struck off, were delivered to the prisoner at a public-house near *Fleet Ditch*, in the city of *London*; that the note was taken from him at *Dover*, where he was apprehended; and that the plate was afterwards found at his lodgings upon *Tower Hill*; but no objection was made that the evidence did not afford sufficient proof of the offence having been committed in the county of *Kent*, where the note was found. An objection upon that ground was certainly taken in the subsequent case of *Rex* v. *Parkes and Brown* (5). The ob-

1805.

CROCKER'S CASE.

jection there was that *the uttering* of the note by *Brown* in the county of *Middlesex*, was not sufficient evidence to prove that *Parkes* had forged it in that county; and some of the Judges thought that this was sufficient, in the absence of other evidence, *Parkes* himself being in the county of *Middlesex* at the time; but all of them agreed that it was a question of fact upon the evidence for the Jury to determine; though they did not think the proof, in that particular case, would warrant the conclusion. In the present case the forged note was found in the custody of the prisoner himself, and therefore the evidence is stronger, in this case, than it was in the case of *Rex* v. *Parkes and Brown*, and justifies the Jury in finding him guilty in the county of *Wilts*. In the case of *Rex* v. *Hensey* (1), it was holden that a letter in the prisoner's hand-writing, dated *Twickenham*, in *Middlesex*, was evidence of an overt act of high treason committed in that county (2). On THE THIRD POINT, he argued, that it could not be contended that if this note were forged with a criminal intent, it is not an offence within the statute, although it never was uttered: for it must either be said that as the note never was uttered, no offence has been committed, or that uttering is the only evidence from which the intent to defraud can be inferred. But that a person may be convicted of forging an instrument which he never actually utters, is decided by the case of *Rex* v. *Elliot* (3), already mentioned, in the report of which it is stated, that "the fact of the forgery was brought home to the prisoner, though the note was never published, it having been found in his possession at the time he was seized; and he was convicted." But no objection was taken to the conviction on that ground, there being *circumstances* sufficient to warrant the Jury in finding a fraudulent intention: so the present case, in like manner, furnishes circumstances to warrant such a finding; for it was proved, that although the body and the signature of the note appeared, at first, to be in different hand-writings, yet that in fact they were both written by the prisoner. It also appeared that he went by a false name in *Wiltshire*; that the indorsement on the note was not true; that it had a proper stamp on it,

(1) 1 Bur. Rep. 645. See also Lord Preston's Case, 1 East, ch. 2. s. 61.

(2) See upon this subject, 1 East's P. C. ch. 2. s. 56.

(3) 2 East's C. L. 951.

1805.

CROCKER'S CASE.

which would not have been necessary if it had not been intended to be used; and that another forged note was found at the same time in his possession.

THE JUDGES never delivered any public opinion upon this case, but the prisoner was pardoned and discharged. It is said, however, that the majority of the Judges considered the objection as to the admissibility of *Tucker*'s evidence, well founded; AND THAT there was not sufficient evidence of the offence having been committed in the county of *Wilts*.

CASE CCCXLI.

THE KING *against* BULLOCK.

1. An averment, in an indictment for felony, that a commission issued under the Great Seal of *Great Britain*, is sufficiently proved by evidence, that it issued under the Great Seal of *Great Britain* and *Ireland*.
2. A bankrupt cannot set up a prior secret act of bankruptcy to invalidate his commission.
3. A *creditor* may prove the act of bankruptcy before the Commissioners, *sed quære*.
4. A commission of bankruptcy is not liable to any of the stamp duties imposed by 44 Geo. III. c. 98.

AT the Old Bailey in September Session 1807, *James Bullock* was tried before MR. JUSTICE HEATH, on the statute 5 Geo. II. c. 30. s. 1. for concealing his effects as a bankrupt, to the amount of 20*l.* with intent to defraud his creditors.

THE INDICTMENT consisted of four counts. THE TWO FIRST COUNTS charged, that he being a brandy merchant, became, as such trader, indebted to *John* and *George Cowell*, in the sum of 189*l.* 19*s.* 2*d.*; that he afterwards became a bankrupt by departing, *on the first May* 1807, from his dwelling-house, with intent to defraud his creditors; that thereupon a commission of bankruptcy, under THE GREAT SEAL of *Great Britain*, was, *in due manner*, awarded against him; that the Commissioners did thereupon, in due manner, and upon good proof on oath taken before them, find that he did become a bankrupt; and that on his examination thereupon before the Commissioners on the 8th June 1807, he did not *fully and truly discover* and deliver up all his estate and effects, &c.; but that he, on the said 8th June, did *unlawfully and feloniously conceal* part of his personal estate, to more than the value of twenty pounds, namely a promissory note of 300*l.* a Bank-note of 500*l.* 28 silver spoons, a silver soup ladle, &c. &c. &c. with intent to defraud his creditors. THE TWO OTHER COUNTS were like the first, only stating that he was, in due manner, found and declared a

1807.

BULLOCK'S CASE.

bankrupt, and that he had removed and embezzled those articles with the like intention.

THE EVIDENCE.—The prisoner, *James Bullock*, was a wine and brandy merchant, who had carried on, for many years, a very extensive trade in *Scott's Yard;* but, in consequence of some unsuccessful speculations to the *Baltic*, had become at length so embarrassed in his affairs, that on the 10th July 1806, he was under the necessity of absenting himself from his dwelling-house, in order to avoid the importunity of his creditors, to whom he was frequently denied on their applying for payment of their debts. During his absence, namely on the 30th July 1806, a person of the name of *Hudson Atkinson*, who was his nephew and clerk, and who had constant interviews with him at the place of his retreat, in *Lordship Lane*, near *Dulwich*, struck A DOCKET against him on the usual affidavit, "that the prisoner was justly and truly indebted to him in the sum of one hundred pounds and upwards, for money lent to him by the said *Hudson Atkinson*, and that he, the said *James Bullock*, had become a bankrupt, &c.;" but no bond was entered into, or instructions given to prepare a commission, nor was any commission ever in fact issued thereon. It also appeared that the docket had been struck by the prisoner's attorney; that the petitioning creditor was a minor; that there were no traces whatever to be found in the prisoner's books of any debt due from him to *Atkinson;* and that on the 5th October 1806, the docket was withdrawn, by the prisoner's attorney, under circumstances which shewed that it had been struck with a view to prevent real creditors from proceeding against the prisoner's estate. On the 28th January 1807, however, the prisoner had sufficient credit left to obtain from Messrs. *J.* and *G. Cowells*, brandy merchants, a variety of goods to a large amount, and particularly two puncheons of rum of the value of 189*l.* 19*s.* 2*d.*; for the payment of which he gave to the vendors his acceptance at three months' date; but which bill, when presented for payment, on *the first of May*, was returned unpaid, and afterwards noted. This induced an inquiry into the state of his affairs, when it was discovered that, in the middle of May 1807, he had removed his books and papers

1807.

BULLOCK'S CASE.

from his counting-house, and transferred his stock in trade and his business to his clerk *George Wallis*, his cellar-man *John Lang*, and his son *George Bullock*, a youth of only six years of age, under the firm of *Wallis*, *Lang* and *Co.* for 2000*l.* and upwards, for which the firm gave him their acceptances, but without deducting 120*l.* which *Wallis* swore he then owed him for arrears of wages. It also appeared that he had, both before and on the first of May, committed a clear act of bankruptcy by departing from his house to delay his creditors. The *Messrs. Cowells* thereupon struck a docket against him for the above sum of 189*l.* 19*s.* 2*d.* and proceeded, as petitioning creditors, to sue out a commission of bankrupt against him under THE GREAT SEAL of *Great Britain* and *Ireland*, which, on its being produced in evidence, appeared engrossed on a *treble sixpenny* stamp; and on the 8th June 1807, he was thereupon declared A BANKRUPT by the Commissioners, and *Mr. Cowell* and *Mr. Medley* were chosen Assignees. But it appeared that the only witness examined by the Commissioners as to the act of bankruptcy, which the prisoner had committed by departing from his home on or about *the first of May* 1807, was a *Mr. William Briant*, who was *a creditor* of the prisoner at the very time he so gave his testimony before them, and that he afterwards proved his debt to the amount of 150*l.* under the commission. *Briant* was also examined as a witness on the trial, and clearly proved the act of bankruptcy (1). On the 18th July the prisoner appeared and submitted to be examined before the Commissioners, on which occasion he gave an account of the manner in which he had disposed of various parts of his property to a very considerable amount; all which it afterwards appeared was totally untrue. But he was suffered to withdraw, and was appointed to appear again on the 23d June, for the purpose of finishing his examination; he being told at the time what the consequences would be if he neglected to appear again on that day: but on that day he did not appear; and upon this default he was proclaimed, in the usual way, and a warrant issued to apprehend him. It was clearly proved that he had clandestinely sent away, by cart-loads, from a house in which he resided on

(1) He had released all claim whatever under the bankrupt's estate, and so became a competent witness on the trial.

1807.

BULLOCK'S CASE.

Dulwich Common, great numbers of large trunks filled with plate, linen, and other valuable articles of various kinds; that he had collected, and concealed Bank-notes to the amount of 1600*l.*; that with these notes he opened an account on the 14th July at the house of a banker, to whom he was a perfect stranger, in the name of *James Brown*, No. 14, *Chapel Street, Park Lane*; that on Saturday the 18th July, almost immediately after his examination, he drew the money out; and that he absconded with it about 4 o'clock on the same day. He was immediately pursued, and was at length discovered at *Leith* in *Scotland*, where he was apprehended on the 23d July, together with sixteen large packages, with directions on them in his own hand-writing, "To *James Brown*, to be left at *Pith and Co.'s* wharf at *Leith*." In one of these packages were found all the silver articles stated in the indictment, and a great variety of other property; and, in another of them, bank-notes to a considerable amount, concealed in a tin case, which appeared to have been made for the purpose. The prisoner was of course secured, conveyed to *London*, examined at *Bow Street*, and committed to Newgate.

THE JURY found the prisoner guilty, and he received sentence of death; but execution was respited, and the case submitted to the consideration of THE TWELVE JUDGES on the following objections.

FIRST, that there was a material *variance*; the indictment averring that the commission was under "THE GREAT SEAL of *Great Britain*," and the evidence proving that it was under "THE GREAT SEAL of *Great Britain* and *Ireland*," and that if it was not a fatal variance, it was *error apparent* upon the face of the record.

SECONDLY, that, as the prisoner had committed an act of bankruptcy, on *the 10th July* 1806, and the present petitioning creditors' debt did not exist until the *1st May* 1807, the present commission was void.

THIRDLY, that the Commissioners having found the prisoner a bankrupt upon the sole testimony of *William Briant*, who was at that time a creditor under the bankrupt's estate,

1807.

BULLOCK'S CASE.

the material allegations in the two first counts "that they did, *in due manner, and upon good proof, upon oath then and there taken before them, find that the prisoner did become a bankrupt*," and the other material allegation in the two last counts "*that the prisoner was in due manner found and declared a bankrupt*," were not proved.

FOURTHLY, that the commission, being marked with only *a treble sixpenny stamp* was void; that not being the stamp which the law in such case requires.

THE case was argued in the Exchequer Chamber on 21st November 1807, and at Serjeants' Inn Hall on 30th November by HOLROYD for the prisoner, and by GURNEY for the Crown.

HOLROYD, *for the prisoner*. The statute 13 Eliz. c. 7. s. 2. directs that commissions of bankrupt shall be issued under THE GREAT SEAL OF ENGLAND, which, at that time, was the seal of the empire (1); that this seal continued to bear the same character until the union of *Scotland*, when the Great Seal of *Great Britain* was formed, substituted, and directed to be used instead of the Great Seal of *England*. Under this seal of the United Kingdom the 5 Geo. II. c. 30. s. 1. directs that commissions of bankrupt shall be issued. On the union with *Ireland*, a new Great Seal under the title of THE GREAT SEAL of *Great Britain* AND *Ireland*" was formed, and this seal is now become the *clavis regni*, or Great Seal of the Empire; under which all commissions of bankrupt must now be, of course, and are in fact issued. The Act of Union with *Scotland* (2), certainly directs "that there shall be one Great Seal for the United Kingdom, different from the Great Seal then used in either kingdom;" but this provision was unnecessary, for as the whole became one kingdom, the Great Seal would, without this clause, have become, by a necessary consequence of law, the King's Great Seal of the whole, and not of any part of the United Kingdom. The Act of Union with *Ireland* (3) assumes that, without any express provision, the Great Seal would, after the union, become the Great Seal of the United Kingdoms, and that those matters which before passed under the Great Seal of

(1) 2 Inst. 551.

(2) 5 Ann. c. 8.

(3) 39 & 40 Geo. III. c. 67.

1807.

BULLOCK'S CASE.

Great Britain, would thenceforth pass under the Great Seal of the United Kingdoms. The Act (1) expressly directs, that the proclamations for holding all future parliaments, shall issue under the Great Seal of the United Kingdoms, and that the King may, if his Majesty think fit, after the union, continue the use of the old seal of *Ireland*, within *that* part of the United Kingdom in like manner as before, except where otherwise provided for by the articles; but no such power is given to continue the old seal of *Great Britain*. The King therefore cannot now use a separate seal either for *Ireland* or for *Great Britain*. He must use the seal of the United Kingdoms. There is therefore a material variance between the charge in the indictment, that this commission was issued under THE GREAT SEAL of *Great Britain*, and the evidence which proves that it was issued under the GREAT SEAL of the United Kingdom of *Great Britain* and *Ireland*. This is a material averment, and cannot be rejected as surplusage; for all instruments that require the Great Seal must, in pleading, be alleged to be under the Great Seal (2); that is, under such a Great Seal as will give them validity, which can now only be given by the Great Seal of the United Kingdoms; for THAT is the only Great Seal now in fact existing, and, of course, the only seal that can give validity to such instruments. As this indictment therefore avers that the commission issued under the Great Seal of *Great Britain*, which is only a part of the United Kingdom, and the evidence shews that it was issued under THE GREAT SEAL of the United Kingdom of *Great Britain* AND *Ireland*, it is either erroneous on the face of it, or the material averment is not proved.

(1) 39 & 40 Geo. III. c. 67. *art.* 4.

(2) Co. 16.

SECONDLY, the prisoner having committed a prior act of bankruptcy on the 10th July 1806, and other debts at that time existing sufficient to sustain a commission (*a*); the

(*a*) HEATH, *Justice*, said that no such evidence was offered, and that if it had been tendered it would not have been received; that it did not appear that any debt subsisted at the time of the prior act of bankruptcy which would have enabled a creditor to petition; that to make a man a bankrupt there must be circumstances under which a commission might issue; and that this cannot be unless there subsists a petitioning creditor's debt. 1 Taunton's Rep. 76, 77.

1807.

BULLOCK'S CASE.

prisoner was not legally able to contract the debt upon which his present bankruptcy has been declared, and so the commission on which it is founded is of course void. He was a bankrupt at the time the present petitioning creditors' debt arose (1), and in the case of *Toms* v. *Mytton* (2), a commission of bankruptcy was, for that reason, held void (*a*).

(1) De *Goles* v. *Ward*, Forrester 243. 1 Cooke's B. L. 26. *Ex parte* Wainman, 1 Cooke 27.

(2) Toms *v.* Mytton, 2 Stra. 734. Ambrose *v.* Clendon, 2 Stra. 1042. Cases Temp. Hard. 267.

THIRDLY, *William Briant*, upon whose single testimony the Commissioners declared the prisoner a bankrupt, was, at the time of his examination, an incompetent witness, he being then a creditor under the prisoner's estate. It is true he was examined as a witness on the trial; but he had previously released all his claims on the estate, which shews that he was not competent before that release was given. The Commissioners are bound to observe, in all their inquiries and proceedings, the same rules of evidence as are required by law to be observed in every other court, and *Briant* was clearly not a competent witness on this subject in any court, before his release. The 5 Geo. II. c. 30. s. 26. it is true, authorizes the Commissioners to receive *affidavits* from creditors in proof of their debts, and inflicts the penalties of perjury on persons who shall swear falsely; but this authority, however it may seem to countenance the practice of examining creditors on oath *viva voce*, can only be intended to render creditors competent in cases where their evidence is necessary for the purpose of procuring the division of the bankrupt's property proportionally among themselves, but can not be extended to cases where persons may, in consequence of such testimony, become subject to criminal prosecution. *Briant* therefore not being a competent witness, the prisoner was not "upon good proof found," nor "duly declared" a bankrupt (*b*).

(*a*) LORD ELLENBOROUGH, C. J. said, that it did not in that case appear but that a previous debt was proved upon which a commission might issue; and that this is included in the reporter's expression, that he "was bankrupt."

(*b*) LORD ELLENBOROUGH, C. J. said, that the statute 5 Geo. II. c. 30. enables the commissioners "to examine *all persons*;" and MANSFIELD, C. J. said, that it never yet was asked on a trial at law, founded on a bankruptcy, upon what evidence the Commissioners declared the man a bankrupt

1807.

BULLOCK'S CASE.

FOURTHLY, The statutes of 5 Will. and Mary, c. 21. the 9 and 10 Will. III. c. 25. and the 12 Geo. I. c. 30. require a treble six-penny stamp for "every *process* or *mandate* under THE SEAL of any of the courts at *Westminster*, &c." in conformity to which the practice has uniformly been, since the year 1726, to issue commissions of bankrupts upon such stamps; they being of the like denomination, and issuing under THE SEAL of the High Court of Chancery; but by the statutes 32 Geo. II. c. 25. s. 1. and 23 Geo. III. c. 58. s. 1. a higher stamp is imposed on "every *process* or *mandate*."

LORD ELLENBOROUGH, *Chief Justice.* Is this commission a mandate? or does it bear THE SEAL of any *court?* It is THE SEAL of the Kingdom.

GURNEY, *for the Crown.*—FIRST, The Act of Union with *Scotland* expressly directs, that THE GREAT SEAL of *Great Britain* shall thenceforth be used instead of the Great Seal of *England;* but no such direction is given by the Act of Union with *Ireland*, with respect to the Great Seal of the United Kingdoms. It does not therefore follow that the new Great Seal which was provided on this event, must be used in all cases where the Great Seal of *Great Britain* was before used. A Great Seal of the United Kingdoms is certainly mentioned in the Act of Union with *Ireland;* but nothing more can be inferred from that circumstance than may be inferred from the mention of the Great Seal of *Great Britain* in many subsequent statutes (1), in which this seal is spoken of and directed to be used. It is certainly true that there is in fact only one Great Seal, which is THE GREAT SEAL of the United Kingdoms; for the old seal of *Great Britain* was, soon after the union, destroyed in the presence of the Lord Chancellor (2); and yet the Admiralty Courts have, since that event, set and inflicted sentence of death, in various instances, under the authority of THE GREAT SEAL of *Great Britain.* It is therefore very strange to contend that an indictment is vitiated by an averment, that this commission was issued under the Great Seal of *Great Britain*, when so many Acts of Parliament have, since the union, used the very same

(1) 41 Geo. III. c. 90. s. 5. 41 Geo. III. c. 108. 43 Geo. III. c. 160. s. 25. 43 Geo. III. c. 96. s. 11. 44 Geo. III. c. 98. page 193. 45 Geo. III. c. 91. 46 Geo. III. c. 54. 46 Geo. III. c. 80. 46 Geo. III. c. 128.

(2) See 1 East's Pleas Crown, 84, 85.

1807.

BULLOCK'S CASE.

expression. These statutes require that THE GREAT SEAL of *Great Britain* should be affixed to the respective instruments which they describe; but those very instruments have in fact been issued under THE GREAT SEAL of the United Kingdoms; for the words of these statutes have been taken as intended to mean "THE GREAT SEAL of the Empire:" the Court therefore will apply the same construction to the same words when found in an indictment, as it would when found in an Act of Parliament; and of course the allegation of "the Great Seal of *Great Britain*" must be considered as equivalent to an averment of "the Great Seal of the United Kingdoms of *Great Britain* and *Ireland*," and then these will be neither variance nor error.

SECONDLY.—To invalidate a commission on account of a prior act of bankruptcy, there must be clear proof of a legally existing petitioning creditor's debt anterior to the act of bankruptcy, on which the commission issued. A commission cannot issue, or if issued cannot be supported, without such a previous debt; but on the trial of this case, no debt of such description was, or, in all appearance, could be proved; for the transaction respecting the docket which was struck on the 30th July 1806, appears to have been fraudulent and void. But if it could, it has been decided in two cases, that a bankrupt cannot impeach his commission by proof of a former act of bankruptcy (1).

(1) Mercer *v.* Wise, 3 Esp. N. P. 216. Parker *v.* Manning, 2 Esp. 597.

THIRDLY.—This objection is now quite immaterial; for the prosecutors at the trial did not rely upon the finding of the Commissioners as to the act of bankruptcy, but they proceeded to prove it by legal evidence precisely in the same way as if no examination whatever had been taken before the Commissioners. Even admitting the incompetency of the witness, the Court could not call upon the commissions to disclose the evidence upon which their judgment was founded, and take a review of the propriety of their decision; for the bankruptcy of the prisoner was a fact which they had full authority to determine; they did exercise their discretion upon the facts that were brought before them; and they did, from those facts, draw the conclusion that the prisoner was bankrupt: that fact

1807.

BULLOCK'S CASE.

has been proved by other witnesses to be true, and it must therefore be intended that they attained that end by correct means.

FOURTHLY.—The statutes which direct that certain stamps shall be affixed to every "writ, mandate, or process that shall pass the seals of any Court at *Westminster*, or the Court of Chancery," &c. do not include a commission of bankrupt, for it is neither a writ, a process, or a mandate: It is an instrument directed to be issued under the Great Seal; but the Great Seal is not mentioned in any of those statutes (1), and therefore cannot be comprehended under general words with seals of inferior dignity. It is certainly the practice to issue such commissions with certain stamps, but it does not appear that any stamp whatever is by law required; for the statute 44 Geo. III. c. 98. which repeals all Stamp Acts that were in force on the 10th October 1804, does not impose any stamp on commissions of this description.

(1) *Ante*, page 1003.

HOLROYD *in reply*, contended that the different ways in which THE GREAT SEAL has been mentioned in several statutes subsequent to the union with *Ireland*, did not vary the law respecting this point; that, in many instances, the Legislature had adopted the common mode of speaking, as "the first Lord of the Treasury," the "first Lord of the Admiralty," the "Lords of the Treasury and Admiralty," but, that it would not be sufficient in PLEADING so to denominate, "the Lords Commissioners of the Treasury or Admiralty."

Ante, p. 1003, in margin.

SECONDLY.—The docket struck against the prisoner on the 30th July 1806, is a material ingredient in this case. The statute 46 Geo. III. c. 135. s. 3. provides, That striking a docket shall be in all events, if there be any act of bankruptcy, notice of a prior act of bankruptcy, and then by s. 5. enacts, "That no commission shall hereafter be avoided by reason of a prior act of bankruptcy, unless the petitioning creditor had notice thereof. The docket therefore is material for the purpose of preventing the consequence of law, that would otherwise attach by virtue of this statute; and where notice is given the law is left as it was before. The only two cases of *Mercer* v. *Wise*, and *Parker* v. *Manning*, in which

1807.

BULLOCK'S CASE.

it was held that a bankrupt cannot impeach the validity of his commission by proof of a prior act of bankruptcy, were decisions at *Nisi Prius*, and cannot be put in opposition to cases that have been more solemnly decided.

THIRDLY.—The declaration of the commissioners, that the prisoner was a bankrupt, is the very foundation upon which the present charge is erected; and it is essential that it should be shewn that they proceeded by legal evidence to reach that conclusion. An incompetent witness cannot give legal evidence; and if the prisoner has not been *duly found*, or declared to be bankrupt, he had a right to retain his goods, against all persons deriving title under the commission.

FOURTHLY.—The general Stamp Act of 44 Geo. III. c. 98. requires a *five shilling stamp* to be affixed to "all writs, mandates and process, under the seal of the Court of Chancery;" and a commission of bankrupts issues under a seal of that Court; and as the practice was to affix the treble six-penny stamp to this sort of commission by virtue of former statutes, a five shilling stamp should have been affixed to the present commission by virtue of 44 Geo. III. c. 98.

THE JUDGES took time to consider this case, but no judgment was publicly given on it. But it is said that they all agreed, that they saw no reason to be dissatisfied with the sentence which had been pronounced. The prisoner was afterwards pardoned, upon condition of being transported for life (*a*).

(*a*) NOTE.—The prisoner, during his confinement, exhibited a petition to the Lord Chancellor, stating the material facts of the above case, and also that on the 10th July, 1806, when he absented himself from his dwelling-house, he was indebted to *Hudson Atkinson*, *George Medley*, one of his assignees, and *F.* and *T. Wilde*, in the amount of 100*l.* each; and that on the 30th July, 1806, *Hudson Atkinson* struck a docket against him. He therefore prayed that the commission might be superseded. But after argument, it was decided, that a person attainted of felony cannot be heard, by petition, to supersede a commission of bankrupt against him, whether such attainder arise directly out of the commission of bankrupt, or is wholly irrelevant to it: AND THAT a bankrupt cannot be permitted to set up a prior *secret* act of bankruptcy to impeach his commission, either at law or in equity.

1807.

CASE CCCXLII.

A stamped policy on which an unstamped memorandum has afterwards been indorsed, is not admissible in evidence on a prosecution on 43 Geo. III. c. 58. against the assured for wilfully setting fire to the house, thereby intended to be insured.

THE KING *against* EDWARD GILLSON.

AT the Old Bailey in September Session 1807, *Edward Gillson* was tried before MR. JUSTICE HEATH, on the statute 43 Geo. III. c. 58. s. 1. for feloniously setting on fire a certain house, then in his own possession.

THE STATUTE recites that certain heinous offences committed by burning, with intent, to destroy or injure the buildings or other property of his Majesty's subjects, or to prejudice persons who had become insurers of or upon the same, had of late been frequently committed, AND ENACTS, "That if any person shall *wilfully*, *maliciously*, and *unlawfully* (*a*) set fire to any house (*b*), barn (*c*), granary, hopoast, malt-house, stable, coach-house, out-house (*d*), mill (*e*), warehouse, or shop, whether such house, &c. shall then be in possession of the person so setting fire thereto, or of any other person, or of any body corporate, with intent thereby to injure or defraud his Majesty, or any of his subjects, or any body corporate, every person or persons so offending shall be deemed felons, and suffer death without benefit of clergy."

THE indictment contained five counts. THE FIRST COUNT charged, that *Edward Gillson*, on the fifth day of August, in the forty-seventh year, &c. at the parish of *St. Clement Danes*, &c. feloniously, wilfully, maliciously, and unlawfully (1) did set fire to a certain house, there situate, *in his own possession*, with intent to injure and defraud The London Assurance of Houses and Goods from Fire, against the statute, &c. The

(1) See Rex *v.* Cox, *ante*, page 71. Case 38.

(*a*) The words "wilful and malicious," &c. are not inserted in the statute 9 Geo. I. c. 22. against burning the house *of another*, yet an indictment on that statute must lay the offence to have been done feloniously, wilfully and maliciously. 1 Hawk. ch. 39. s. 5. Cox's Case, *ante*, page 71, Case 38. Rickman's Case, 2 East, 1034.

(*b*) See 1 Hale, 567. 570. Serm. 86. 3 Inst. 67. 69. 1 Hawk. c. 39. s. 1. 4 Bl. Com. 221. Donnovan's Case, *ante*, page 69, Case 37.

(*c*) See Susanna Minton's Case, 2 East, 1021.

(*d*) See North's Case, 2 East, 1021.

(*e*) See Jepson and Springett's Case, 2 East, 1115, the statute 9 Geo. III. c. 29. s. 2. and the case of Rex *v.* Taylor, *ante*, page 49, Case 25.

1807.

GILLSON'S CASE.

SECOND COUNT was the same as the first, only "with intent to injure and defraud THE CORPORATION of The London Assurance of Houses and Goods from Fire." THE THIRD COUNT the same, with intent to injure and defraud *Mathew Wilson*, *Major Rhode*, and *Charles Hampden Turner*. THE FOURTH COUNT, with intent to injure *William Richards*. And THE FIFTH COUNT, with intent to injure *John Langfield*.

THE EVIDENCE.—The prisoner kept an eating-house in *Old Boswell Court*, to which he removed on the 21st September 1806, from a house called *The Golden Shears* in *Wood-street*. On 19th May 1806, he opened a policy by which he insured the sum of 620*l*. on household goods and other articles in his house in *Wood-street*, until the 24th June, 1807, and paid the premium accordingly. Upon this policy, which was stamped as a policy, was indorsed *a memorandum* dated the 16th September, 1806, stating "that the household furniture, &c. mentioned in the said policy were removed from *No.* 85, *Wood-street*, to *No.* 13, *Old Boswell Court*," which removal was thereby allowed. This indorsement purported to be signed by two directors, stating it to be "*By order of the Court*;" but the memorandum, thus endorsed, was not stamped, nor was it under THE CORPORATION SEAL. On the 11th June, 1807, the prisoner paid 14*s*. 6*d*. for a year's premium on the said policy so endorsed, and received the usual receipt for the same, marked with THE CORPORATION SEAL, by which payment it was stated in the receipt, that he "became insured from 24th June 1807, to the 24th June 1808, upon the sum of £620 assured by the said policy." It was clearly proved that the prisoner was in possession of the house as a tenant from year to year; that the whole property it contained was not worth £40; and that on 5th August 1807, he had wilfully set the premises on fire. It was also proved, by the secretary of the corporation, that the present memorandum was made according to the constant and uniform practice of the office in all cases of the like kind; and that if a loss had happened in this case by accidental fire, the corporation would have paid the sum intended to be secured by the said policy to the prisoner. It also appeared that, previous to the fire, a box containing,

S. C. 1 Taunton's Rep. 95.

among other papers, the policy, and the receipt for the last payment of the premium, had been removed to a house in the neighbourhood, and after the fire was extinguished, brought back by the prisoner's wife, who had delivered the key of it to a particular friend, with a very anxious injunction, that he would be very careful of it. 1807. GILLSON'S CASE.

KNAPP, *for the prisoner*, submitted to the Court, FIRST, that THE MEMORANDUM indorsed on the policy ought to have been stamped with a proper stamp, either as a policy, or as an agreement; and that the want of such stamp had made THE POLICY void, as being a fraud on the revenue. SECONDLY, that the memorandum ought to have been under THE SEAL of the corporation.

THE Jury found the prisoner guilty; but the case was saved for the opinion of THE JUDGES on the above objections. It was argued on the 1st December following in the Exchequer Chamber before eleven Judges, by KNAPP, *for the prisoner*, and POOLEY, *for the Crown*.

KNAPP, *for the prisoner*, contended that this memorandum, not being stamped, could not be admitted in evidence in a civil suit; and that therefore it could not, *a fortiori*, be given in evidence in a criminal prosecution affecting the life of the party. To shew that if this fire had been accidental the prisoner could not have recovered satisfaction for his loss in an action on this indorsement, he cited *Phillips* v. *Prosser* (1), where the want of a proper stamp was held fatal to a lease for three years, which had been reduced into writing, although it would have been good if it had continued by parol; and *Whitwell* v. *Dimsdale* (2), where the evidence of an unstamped agreement for an assignment, made by a bankrupt to his sons, of all his effects, was offered to prove the declining state of the bankrupt's affairs, and rejected by Lord Kenyon. The statutes, also, which require policies of assurance against fire to be stamped (3), enact, "That no such matter or thing "shall be available in law or equity, or given in evidence, "or admitted in any court, unless the said stamp duties have

(1) Buller's Nisi Prius, 269.

2 Peake's Nisi Prius, 167.

(3) 5 Will. & Mary, c. 21. ss. 3 and 11. 9 & 10 Will. III. c. 25. 10 Ann. c. 19. s. 195. 10 Ann. c. 26. s. 73.

1807.

GILLSON'S CASE.

"been duly paid," and the statute 44 Geo. III. c. 98. (1) gives, in lieu of the former duties, a new duty of 2*s.* 6*d.* for every hundred pounds of the value of property insured against fire. The reason assigned by the Judges (2), for allowing unstamped instruments to be given in evidence in cases of FORGERY is, that the Stamp Acts were not intended to make any alteration in the nature or proof of that crime; that they relate exclusively to cases which concern the revenue; and that it would be contrary to every principle of law, to allow any man to avail himself of his own fraudulent act, by setting up the want of a stamp to an instrument, which he himself had forged. But this is not a case of forgery; it is a case of a widely different kind; a case in which it is necessary that there should be a legally effective instrument subsisting, declarative of the contract between the parties; for unless there be such an instrument as the prisoner could have availed himself of in law, he could not ultimately have defrauded the London Assurance Company, whatever his intention might have been upon that subject; as he could not possibly have recovered the sum supposed to be insured on the policy. This defective and inefficient instrument was not devised or made by the prisoner; it was framed entirely by the Corporation, as their act and deed. They have received his money, and given him a bad security for his property. He is the person on whom a fraud has been practised, by having this vitiated policy given to him, as and for a good and valid policy.—It is said, however, that this amounts to *an agreement* between the parties; and that if this fire had been accidental, the sum insured would have been punctually paid, notwithstanding any legal infirmity in the policy; but a corporation cannot bind itself by a mere agreement, it must make its contracts by *deed*; and as the contract upon the present occasion has not been framed as the law requires, an intent to defraud cannot be inferred where no fraud could, by possibility of law, be effected.

(1) Schedule B.

(2) Rex *v.* Hawkeswood, *ante*, page 257. Case 129. Rex *v.* Reculist, *ante*, page 703. Case 290. Rex *v.* Morton, *ante*, page 258, *notis*, and more fully reported, 2 East, 955.

POOLEY, *for the Crown*, contended that the prisoner, by his care to preserve this policy from flames of his own creating, proved that he relied upon it as a good and valid policy; and a

1807.

GILLSON'S CASE.

valid policy it certainly would have been to him, if he had been honest, and the fire accidental; for, being executed, in every respect, according to the common usage and custom of THE CORPORATION, the full amount of the loss would, in such case, have been punctually paid. But the question is, not what the corporation would have felt itself bound in honour and in honesty to do, but whether this case furnishes sufficient evidence to shew that the prisoner intentionally set his house feloniously on fire with intent to defraud the London Assurance Corporation. It is contended, that the defects of the policy are such as would have prevented the assured from recovering on it in an action at law, if the fire had been accidental, and that therefore he cannot be guilty of arson, although the conflagration was clearly created by him with a wicked and fraudulent intention to obtain the sum insured from the funds of the insurers. The supposed defects are the want of a proper stamp, and the want of the corporation seal to the memorandum indorsed on the policy; the policy itself, when originally framed, having neither of these supposed defects about it. There is no averment in the indictment that the goods were insured, nor is there any mention made of the policy; nor was it produced for the purpose of proving that any insurance had been made, but merely for the collateral purpose of shewing the prisoner's intent in setting his house on fire. Suppose the prisoner had sued the insurers on this policy, and that, on *Non est factum* pleaded, the defendants had shewed that the name of one of the parties was affixed to the instrument by attorney, under a forged deed of procuration; this would certainly destroy the validity of the contract under which the plaintiff claimed; but could the *quo animo* with which the felonious act had been done be rendered doubtful by his having brought such an action? The defect, if any, in the policy, cannot affect or alter the nature of the present question. There is no rule in the Common Law, which prevents that sort of instrument from being produced in evidence in any case; nor does the Statute Book contain any prohibition on this subject. The object of the Legislature,

1807.

GILLSON'S CASE.

wherever the Legislature has interfered (1), was merely to secure the payment of the stamp duties; but not to prevent instruments, like the present, from being given in evidence for other purposes. This has been frequently determined in a great variety of modern cases (2), on the subject of forgery, and the same doctrine applies with equal reason to the present case. The prohibitory clauses of the Stamp Acts apply only to the persons by whom the unstamped instruments are made, in order to prevent them from thereby deriving any advantage from their inattention or default, and to compel them to pay the duties. The statutes 5 Will. & Mary, c. 21. s. 11. and 9 & 10 Will. III. c. 25. s. 48. as well as 10 Ann. c. 19. s. 172. expressly confine the penalty to *the person* who draws the instrument, and render him incapable, according to the corresponding principles in the case of *Rex* v. *Colin Reculist* (3), of giving it in evidence for the purpose of enforcing a performance of the obligation it was designed to create. These prohibitory clauses, therefore, mean nothing more than that an unstamped instrument shall not be effective or available *between the parties* themselves, or those who claim under them; and the disability to use such instrument is created solely for the purpose of punishing persons who thereby attempt to defraud the revenue, by rendering their attempt vain and the subject of it useless. But the laws never intended to preclude such instruments being given in evidence in other cases in which it is material to the public interests, as in the present case, that they should be received, especially when necessary to prove the guilt of an atrocious offender. This is the true principle upon which, in the cases of *Rex* v. *Hawkeswood* (4), *Rex* v. *Moreton* (5), and other cases (6), unstamped instruments have been uniformly admitted in evidence against criminal offenders. In all criminal cases, as in forgery, it is not necessary that the forged instrument should be of such a kind as, if genuine, would be available in law; for the question, whether it be the sort of instrument that it is charged to be, depends on its TENOR, and not on the circumstance of its being stamped or unstamped (7). A forgery, therefore, of a will is indictable,

(1) 12 Ann. c. 9. s. 14. 30 Geo. II. c. 19. ss. 1 & 5. 5 Geo. III. c. 35. ss. 4 & 10. 16 Geo. III. c. 34. s. 5. 37 Geo. III. c. 90. ss. 2, 3 & 4. 44 Geo. III. c. 98. See also 48 Geo. III. c. 149.

(2) See 2 East, 955.

(3) *Ante*, page 703. Case 290.

(4) *Ante*, page 257. Case 129.

(5) *Ante*, page 258, *notis*.

(6) See the case Rex v. Pooley, page 887. Case 322.

(7) Per Grose, J. in Rex v. Reculist, *ante*, page 703. Case 209.

1807.

GILLSON'S CASE.

although the supposed testator be alive, and although it can have no legal effect until his death (1); and the same principle is recognized in the Case of *Japhet Crook* (2). At the Old Bailey, in September Session 1807, *Edward Cook* and *John Squeers* were tried before THE RECORDER for feloniously stealing, on the 10th May preceding, an *order for the payment of money*, and a *Bill of Exchange*, contrary to the statute 2 Geo. II. c. 25. s. 3. The order for the payment of money was paid by the banker on whom it was drawn, after it had been seen in the possession of *Cook*, by a person to whom he gave it for the purpose of receiving the money, but who returned it to him again; what had become of the Bill of Exchange did not appear; but the order being identified, it was offered in evidence to prove that the prisoner had also stolen the Bill of Exchange, both instruments having been feloniously taken at the same time; but it appeared that this order was not stamped, as by its tenor it ought to have been, pursuant to the statute 31 Geo. III. c. 25. s. 4. and its admissibility was objected to on that account; but THE COURT said, "That though the paper was not a subject of larceny, as not being an available security within 2 Geo. II. c. 25., it was evidence to go to the Jury for the purpose of shewing that HE who had this in his possession stole the other things that were taken at the same time with it (*a*). Upon the same principle, if gold or notes, which the prosecutor could not otherwise identify, were wrapped up in an unstamped policy, and were in that state stolen, the policy might be given in evidence for the purpose of identifying the gold or notes.

(1) Rex v. Sterling, *ante*, page 99. Case 57. Rex v. Coogan, *ante*, page 449. Case 209.

(2) Stra. 901. *ante*, page 706, *notis*.

KNAPP, *in reply*.—It may be admitted, according to the case last-mentioned, that *the paper* on which this policy is written, as well as *the paper* on which the order was drawn, are legal evi-

(*a*) See Rex *v.* Pooley, Old Bailey January Session, 1801, where it was determined, on an indictment on 7 Geo. III. c. 50. s. 2. for stealing *a letter* out of the Post-Office, that *a check* contained in it, though void by 31 Geo. III. c. 25. s. 4. for want of a stamp, may be given in evidence for the purpose of shewing that the prisoner stole the letter, *ante*, page 900. Case 323.

1807.

GILLSON'S CASE.

dence, for the mere purpose of identifying the property which those papers respectively contained. But THE TENOR of neither of those papers was not, nor could either of them be read in evidence as legal and valid instruments, they being void in law in having been drawn contrary to the injunctions of the Legislature. But in the present case, the prosecutor seeks to give this infirm and defective policy in evidence, and to read its contents as a sound and perfect instrument available in law between the parties. Neither the 5 Will. & Mary, c. 21., nor the 9 & 10 Will. III. c. 25., which impose stamp duties on this kind of policy, contains any exception from the particular purposes for which unstamped instruments may be given in evidence; and where the words of a statute are general, the Court will not narrow their meaning when they are to be applied *contra reum*, more especially as the 37 Geo. III. c. 3. s. 7. expressly declares, that they shall not be received in evidence "*in any manner whatever.*" The distinction which has been pointed out as resulting from the decided cases respecting the admissibility of unstamped instruments, has hitherto been confined to collateral cases of FORGERY, where the instrument produced has been the fabrication of the accused party; but this instrument was not fabricated by the prisoner. The principle, therefore, upon which that distinction is supposed to be founded, must still be restricted to prosecutions for that particular offence; and the point, as to a different offence, like the present, be considered as *res integra*.

JUDGMENT was given at the Old Bailey on the ensuing day, and the opinion, it is said, of six Judges out of eleven, was that the prisoner should be discharged.

1809.

THE KING *against* STOCK AND EDWARDS.

CASE CCCXLIII.

A burglary committed in a banker's *shop*, in which no person slept, but to which there was a communication, by a trap-door and a ladder, from the upper rooms of the house, in which only a weekly workman and his family lived by the permission of the three partners, who were owners of the whole house, may be laid to be committed in the *dwelling-house* of these partners; for they inhabit it by means of their servant.

2 Taunt. 339.

AT the Summer Assizes at *Carlisle* 1809, the two prisoners were tried before MR. JUSTICE CHAMBRE, for burglariously breaking and entering the dwelling-house of *William Moore*, *Thomas Harrison*, and *John Hamilton*, and stealing money, bills, and notes, their property, to the value of nine thousand pounds.

THE prosecutors were copartners at *Whitehaven*, both as bankers and as brewers. The ground-floor of the house, was used by the partners in both these concerns. It consisted of three rooms, to which rooms there was only one entrance by a door from the street. This was the door which the prisoners broke open, and by that means got access to the property, which they took and carried away. This outer door opened into one of the three rooms, and in this room the accounts of the brewery concern were separately carried on. From this particular room there was a door which immediately opened into another of the said three rooms, and in this inner room the concerns of the banking business were transacted. This room also was the place where the cash, notes, and other property belonging to the banking concern were kept, and which were locked up at night in an iron chest that stood in the room. This room, so appropriated to the banking business, communicated, in the same manner, with a further room, which was used as the private room of the partners in both concerns. To the outer door of the street there were two locks, one large and the other small. A particular clerk had the custody of the large key, and two other clerks had each a key of the smaller size. No person slept in any of these three lower rooms; but when the street door was locked at night, the clerk who kept the large key, left it, on his quitting the offices, in the care of the person who inhabited the upper rooms of the house, and called for it again in the morning, when he returned to the offices. The upper rooms of the house were inhabited

1809.

STOCK AND EDWARDS'S CASE.

by one *John Stevenson*, who was the cooper employed by the prosecutors in their brewing concern: he was paid half a guinea a week, and had firing and lodging for himself and family. But the contract as to the lodging, was not, in general terms, that he should be provided with lodging, but that he should be permitted to have the upper rooms for the accommodation of him and his family. There was a separate entrance from the street to that part of the house which *Stevenson* thus inhabited; and in these upper rooms the prosecutors kept some papers of no consequence. There was no communication between these upper rooms and the under rooms, where the business was carried on, except by *a trap-door* (*a*), and a ladder from one of the upper into one of the lower rooms, but neither the trap-door nor ladder had ever been used, for any purpose, previous to the robbery, although it might have been used as a way into the lower apartments, for it had never been locked, or in any way fastened, and the key of it was left in *Stevenson*'s custody. It was, however, after the robbery, constantly used as a way or entrance into the lower rooms, for the purpose of bolting the street-door on the inside for greater security. In these upper rooms of the house there were six windows, for which windows *Stevenson* was

(*a*) The opening of a door of this description has been held to be a sufficient breaking to constitute the offence of burglary. *William Brown* was indicted at the Spring Assizes at *Winton*, in the year 1799, before MR. JUSTICE BULLER, for breaking and entering the dwelling-house of *George Aldridge*, in the night-time, with intent to steal, &c. The place which the prisoner entered was a mill, under the same roof and within the same curtilage as the dwelling-house. Through the mill was an open entrance or gateway, capable of admitting waggons, and intended for the purpose of loading them more easily with flour, through a large aperture, or hatch, over the gateway, communicating with the floor above: this aperture was closed with folding-doors, with hinges which fell over it, and remained closed by their own weight, but without any interior fastening, so that those without under the gateway could push them open at their pleasure, by a moderate exertion of strength; and in this manner the prisoner was proved to have entered the mill in the night, with the evident intention of stealing the flour; and this was held a sufficient breaking to constitute the offence. 2 East's C. L. 487.

assessed as occupier, but the rate was paid by his masters. The windows in the lower rooms were not rated to the window-tax, those rooms being considered by the assessors as uninhabited.

THE COUNSEL *for the prisoners* contended, FIRST, That this mode of inhabiting the premises could not be considered as the inhabitancy of the prosecutors, *Moore*, *Harrison*, and *Hamilton*, by means of their servant *Stevenson* (1), for that the terms of the contract which they had made with him shewed that he was living there, not as their *servant* but their *tenant*, and therefore, that the upper part of the house was *Stevenson's* dwelling-house, and not the dwelling-house of the prosecutors. SECONDLY, Admitting the house to be, in contemplation of law, the constructive dwelling of the prosecutors, yet that they had made such a *severance* of the lower from the upper part of it, that the lower part, in which the burglary was committed, could not, in law, be considered as an undivided part of such dwelling-house.

(1) 1 Hawk. c. 38. sect. 13 & 14. 1 Hale, 522. 557. Kely. 27.

THE Jury found a verdict of guilty, and sentence of death was passed upon the prisoners; but the learned Judge, not being satisfied that the house could, under the circumstances of the case, be considered as the dwelling-house of the prosecutors, respited the execution, and saved the case for the consideration of THE TWELVE JUDGES.

IT was argued in the Exchequer Chamber, in Michaelmas Term 1810, by RAINE, for the prisoner.

RAINE, *for the prisoner*.—A house, to constitute that species of dwelling-house in which burglary can be committed, must be inhabited, either by the holder of it himself, or by his servants for him; but this house cannot be considered to have been so inhabited by the prosecutors. It is clear that they did not inhabit it by themselves, and it seems equally clear that *Stevenson* did not inhabit it in their right, and as their representative. He was not their domestic servant, but merely a cooper employed by them, not in their banking, but solely in their brewery concern; he had no employment whatever under them as bankers. The terms of the contract on which he was

1809.

STOCK AND EDWARDS'S CASE.

hired were, that he should be paid half a guinea, and have the use of these rooms as and for his weekly wages. It appeared in evidence, that the usual weekly wages of a person in his situation were fourteen shillings a week without lodgings. He was therefore, it seems, a person to whom these rooms were demised and let at three shillings and sixpence a week, which letting makes him A TENANT of these premises (*a*), and in that character, for it could be in no other, he was personally assessed for the window-tax.

LORD ELLENBOROUGH, *Chief Justice.*—This man, *Stevenson*, certainly could not have maintained *trespass* against his employers if they had entered these rooms without his consent. Does a gentleman, who assigns to his coachman the rooms over his stables, thereby make him a tenant? The act of the assessors, whether right or wrong, in assessing *Stevenson* for the windows of these upper rooms, can make no difference in this case: nor is it material to which of the two

(*a*) *George Brown* was tried at the Summer Assizes at *Newcastle* in the year 1787, before MR. JUSTICE WILSON, for burglary in the dwelling-house of 1st, *Martin Grayden*; and 2d, of *Thomas Trumbull*. *Grayden*, a farmer, lived in the dwelling-house to which there were annexed, in one range of building and under the same roof, a stable, a cow-house, a cottage, and a barn; but they were not inclosed by any wall or court-yard, nor had these places any internal communication from the one to the other. *Trumbull* was *Grayden*'s servant, *and he and his family resided in the cottage by agreement with* Grayden *when he went into his service, but* Trumbull *paid no rent; only an abatement was made in his wages on account of his family being to reside in the cottage.* Some corn having been stolen out of the barn, *Trumbull* and another person put a bed into the barn, and went and slept there, and on the fourth night after they had so done, the prisoner unlocked the barn-door and took away a quantity of oats. A doubt arose whether this could be considered as the dwelling-house of either *Grayden* or *Trumbull*. The point was saved, and all the Judges agreed that the sleeping in the barn made no difference; but they held that this was no more than *a licence* to *Trumbull*, the servant, *to lodge in the cottage* and *not a letting of it* to him; and that the barn, as well as the rest of the buildings, being under the same roof, continued part of the mansion-house of *Grayden*. 2 East, 501, 502. So a porter lying in a warehouse *to watch goods* which is only for a particular purpose, does not make it a dwelling-house. 2 Rex *v.* Smith, 2 East, 497.

1809.

STOCK AND EDWARDS'S CASE.

trades the prosecutors carried on; *Stevenson* was servant, for the property in both partnerships belonged to the same persons. As to *the severance*, the key of the trap-door was left with *Stevenson*, and the door was never fastened (*a*); and it can make no difference, whether the communication between the upper and the lower rooms was through a trap-door, or by a common stair-case.

MANSFIELD, *Chief Justice*.—The prosecutors could have turned *Stevenson* out of these premises whenever they pleased. He was their servant, who, like many other servants, as, for instance, porters at park-gates, had these rooms assigned to him to live in; and surely, if a master chuse to turn away his servant, it does not follow that he cannot evict him until the end of the year.

THE JUDGES took time to advise upon the case, but no opinion was ever publicly given. But the prisoners were afterwards executed.

(*a*) See Smith's Case, 2 East, 497. that if all communication with the dwelling-house of which the place broken is a part, be not excluded, it may still be a part of the house in which burglary may be committed.

THE KING *against* GILBERT HOLDEN AND OTHERS.

CASE CCCXLIV.

An indictment on the 45 Geo. III. c. 89. s. 2. for *disposing of*, and *putting away*, forged bank-notes, with intent to defraud the Bank, is good, although it do not state *in what manner*, or *to whom* they were so put away, and although the person to whom they were disposed of, purchased them as and for, and knew them, at the time, to be forged notes, and purchased them, upon his own solicitation, and as agent for the Bank, for the very purpose of bringing the offenders to justice.

AT the Summer Assizes for *Lancaster*, in the year 1809, *Gilbert Holden*, *Lawrance Law*, *James Smith*, *Robert Hartley*, *James Draper*, and *James Cudworth*, were *severally* indicted and tried before MR. JUSTICE CHAMBRE, on the statute 45 Geo. III. c. 89. s. 1 and 2.—The first section makes the forging of a promissory note for payment of money a capital offence. The second section ENACTS, "That if any person or persons shall forge, counterfeit, or alter any bank-note, or shall offer, or dispose of, or put away any such forged, counterfeited, or altered note, or demand the money therein contained, or pretended to be due thereon, or any part thereof, of the said Company, or any of their officers or servants, knowing such note to be forged, counterfeited or altered, with intent to defraud the said Governor and Company, or any other person or persons, body or

1809.

HOLDEN'S CASE.

bodies politic or corporate whatsoever, every person or persons so offending shall be deemed guilty of felony, and shall suffer death without benefit of clergy."

THE six indictments contained four counts each, and were precisely similar to each other. The first count charged the prisoner with having forged the bank-note set forth in the particular indictment, with intent to defraud the Governor and Company of the Bank of *England*. The second count charged the prisoner with disposing of, and putting away the said note knowing it to be forged, with the like intention. The third and fourth counts, were the same as the first and second, only charging the instruments forged, and disposed of, and put away, to be *promissory notes, for the payment of money*, instead of *bank-notes*. But no evidence was given on the first and third counts, charging the forgery; nor did either of the counts charge *in what manner* or *to whom* the respective notes had been *disposed of* and *put away*.

THE EVIDENCE.—The county of *Lancaster* had for some years been overwhelmed with an enormous circulation of forged bank-notes, all of which, it appeared, had originally been fabricated at certain mints in the town of *Birmingham* and its vicinities; but the traffic had been conducted with so much secrecy, that both the forgers and the utterers, although strongly suspected, contrived, for a long time, to elude detection. The vigilance of the provincial police however at length discovered, that two different descriptions of persons, the one wholesale, the other retail dealers, were concerned in these nefarious transactions: the wholesale dealers resorted occasionally to *Birmingham*, where they supplied themselves with large quantities of forged notes at about one quarter of their denominated value, and then resorted to *Manchester*, *Rochdale*, *Bolton*, and the other manufacturing towns in the county, where they disposed of them to the retail dealers, either singly, or in small quantities, at a profit of nearly one hundred per cent. These practices rose to such a height as to create an alarm in the county, and various associations were formed by the Magistrates and gentlemen in their re-

1809.

HOLDEN'S CASE.

spective districts, for the purpose of adopting such measures as were most likely to obstruct the progress of this increasing evil. At length seven persons, six of whom were these inferior traders, were apprehended as utterers of the *Birmingham* forged notes, and were tried, convicted, and executed for that offence. They were all indigent and, many of them, very distressed persons, who were tempted to engage in this criminal practice, by the necessities of the moment, and by the persuasion of the wholesale dealers: and in some instances were mere instruments acting under their direction, and in their employment. Five of these unfortunate delinquents, a few days before the day of execution, made free and voluntary confessions of their guilt, and gave a very minute description of *the persons* from whom they had received the notes, and the manner in which these transactions had been carried on. Among many other offenders whom this disclosure inculpated, were the six persons now indicted; an information of which was immediately communicated to the magistrates at *Rochdale*, in which town and its neighbourhood most of them were known to reside, or to occasionally resort. This information was expressly given with a view that some means might be adopted to detect and apprehend these reputed offenders. The magistrates accordingly assembled, and, on consultation, resolved to act with vigour upon the subject; but a difficulty arose how to engage proper persons in the execution of so arduous and delicate a task. This difficulty created, for some time, a suspension of further activity. At length *Mr. John Shaw*, a very considerable and respectable manufacturer in *Rochdale*, and *Mr. William Whitehead*, an opulent innkeeper of the same place, offered their united assistance upon this occasion. This offer was immediately communicated to, and accepted by, the Governors of the Bank; but the mode in which these gentlemen should think proper to proceed in the business, was left entirely to their own judgment and discretion. They accordingly deliberated privately upon the subject; and the first proceeding was made by *Mr. Shaw* on 8th May 1809, on which day he sent his servant to the prisoner *Lawrance Law*, a seller of pots and earthern ware in

1809.

HOLDEN'S CASE.

Rochdale market, requesting to see him on particular business. On his coming, *Shaw* represented to him, by distant hints and ambiguous insinuations, that he knew him to be a dealer in the article of forged bank-notes, and that he wished to become a purchaser. *Law*, after very considerable hesitation, and many precautionary observations, was at length induced to admit the fact. Soon after this interview *Law* introduced *Mr. Shaw* to the other prisoner *Gilbert Holden*, a very large and leading dealer in this way, living at *Horsefield* near *Rushey Hill*, whose confidence he so quickly obtained, that *Holden* on the 11th of May sold him four two pound forged notes, for twenty-six shillings each, and on the 15th May three other two pound notes at the same rate, one of which last notes was that which HE was charged in the indictment with having disposed of and put away. These notes had been procured for this purpose by *Holden*, according to the precautionary custom of these dealers, from the prisoner *James Cudworth*, another wholesale dealer, who lived at *Shawford*, and to whom *Holden* afterwards introduced *Shaw*, as a trusty person who might be confided in, as an utterer of fabricated paper. *Shaw*, upon this introduction, bought of *Cudworth* on the 12th June, three two pound forged notes at 26*s.* each, and *Mr. Whitehead*, whom *Mr. Shaw* had contrived to introduce into the confidence of the parties as a person with whom they might safely deal, purchased of him, at the same time, and in the presence of *Lawrance Law*, three other two pound forged notes at the same price. It also appeared that *Mr. Whitehead* had, on the 17th May, purchased of *Holden* four two pound forged notes for 5*l.* 4*s.* which *Holden* had said he could procure, and which, by the desire of *Whitehead*, he had fetched that morning from *James Cudworth*, who appeared to be the great depositary of this association of depredators. On the 5th June *Lawrance Law* introduced *Mr. Shaw* to the prisoner *James Smith*, another wholesale dealer, keeping an open shop at *Manchester*, of whom, after calling at his house several times, he bought, on the 20th June, two two pound forged notes, for 2*l.* 10*s.* and which notes *Smith* had procured, for the purpose, from the prisoner,

1809.

HOLDEN'S CASE.

James Draper, an auctioneer at *Bolton*, whom *Smith* had, on the 8th June, introduced to *Mr. Whitehead*, as a person who could let him have whatever quantity of forged notes he might please to order; but *Draper* not thinking it worth his while to deal for less than twenty at a time, and *Whitehead* offering to take only five, they parted without doing any business. *Mr. Whitehead* then proceeded alone to *James Smith*'s house, who produced to him a large bundle of forged notes, from which *Mr. Whitehead* selected ten of two pounds each, and paid him thirteen guineas in gold, the prisoner *Smith* voluntarily giving two more one pound notes by way of making it a better bargain. He also sold to him, at the same time, A PIECE, as it was called, of base money, *viz.* 28 shillings for a guinea. While this transaction was passing, *Whitehead* expressed a wish to have some five pound forged notes, and *Smith* immediately promised to procure them for him on the ensuing day, and carry them to his house at the Flying Horse in *Packer Street*; and accordingly on the morning of the next day *Smith* carried four five pound forged notes to *Mr. Whitehead*, and received for them eleven pounds from him. On the same day *Mr. Whitehead* paid *Lawrance Law* for a quantity of two pound notes, which he had purchased of him the same morning, in a different room; these cautious traders not chusing to do actual business in the presence of any third person whatever: *Law* therefore retired before *Smith* was paid. On the 16th June *Lawrance Law* and *Robert Hartley* carried two five pound forged notes to the house of *Mr. Whitehead*, and sold them to him for 5*l.* 10*s.* saying they were of a better make than those which came from *Birmingham*, and that he might have any quantity he pleased. On the 23rd June *Mr. Shaw* and *Mr. Whitehead* went, by previous appointment, to *Bolton* for the purpose of meeting *James Draper*, to whom they had been introduced by *Lawrance Law*, as persons with whom he might venture, without hesitation, to deal to any extent, and upon this first interview *Mr. Shaw* purchased of him five one pound, and four two pounds forged notes for five guineas; and *Mr. Whitehead* the like number for the same price; the prisoner at the same time

1809.

HOLDEN'S CASE.

informing them that he was going, in a few days, to the great manufactory at *Birmingham*, and should return in the course of a week with some capital stuff. During the course of these transactions, on or about the 4th July, while *Mr. Whitehead* was conversing with the prisoner *James Smith* in the *Shudehill* at *Manchester*, as to the likeliest means of obtaining an introduction to the Birmingham fabricators, in order to purchase these sort of notes at the first hand, they were joined by the prisoner *Robert Hartley*, who after taking *Smith* on one side and speaking to him privately, came up to *Mr. Whitehead* and said, "I can let you have a five pound note;" *Whitehead* agreed to take it, and appointed to meet him at the Old Boar's Head in twenty minutes. In the interval *Mr. Whitehead* ran to give *Mr. Shaw* information of the meeting. These two gentlemen went accordingly to the place appointed, where they found the prisoner *Hartley* in the parlour, but sitting apart from other company that were in the room: soon afterwards *Hartley* pulled the note from his pocket, and gave it to *Mr. Whitehead*, saying, "2*l.* 12*s.* 6*d.* I cannot afford it for less," which money *Whitehead* paid him, and, at the same time, introduced *Mr. Shaw* to him as his friend, and as a person who was *up to the thing*, and of whom he need not be afraid. In consequence of this recommendation *Hartley* let *Mr. Shaw* have three one pound notes for thirty shillings. *Lawrance Law*, on Saturday 8th July 1809, called on *Whitehead* early in the morning, and informed him that he had just been concealing twenty very nice forged notes in a hedge in *The broad field*. *Mr. Whitehead* desired him to fetch them; and on their being produced, he selected three fives and six ones, and paid him 11*l.* 9*s.* for them. On the evening of the ensuing day *Robert Hartley* called upon him, and sold him, out of a bundle of notes which he then produced, one five and three ones for 4*l.* 3*s.* which he paid him for in gold. On the 16th July *Mr. Whitehead* went to *Bolton* by appointment to meet *James Draper*, and there purchased of him ten ones for 4*l.*; on the 20th six twos for four guineas; and on Sunday 23d July ten ones for 3*l.* 10*s.* Early on the ensuing Monday the further progress of these transactions was terminated by the apprehension of the six

prisoners, who were examined before the bench of Magistrates, and committed, on the testimonies of *Mr. Shaw*, and *Mr. Whitehead*, for trial. This is the general outline of the history of these transactions, the substance of which were disclosed in evidence, by the testimonies of the two gentlemen above named, who had so ardently and spiritedly undertaken this service for the benefit of the public. They were the only witnesses examined as to the material facts of the case. *Mr. Garnet Terry*, engraver to the Bank, proved, that neither the plate nor the paper used in the fabrication of these notes were of the kinds used by the Bank; and *Mr. John Lees*, the inspector of bank-notes at the Bank, proved the notes to be forged.

THE Jury found each prisoner guilty; but their counsel submitted two questions to the consideration of the Court, on which the following case was made for the opinion of THE TWELVE JUDGES.

THE CASE.—The six prisoners, *Gilbert Holden*, *Lawrance Law*, *James Smith*, *Robert Hartley*, *James Draper* and *James Cudworth*, were severally indicted, tried, and convicted, before me at the last *Lancaster Assizes*, for knowingly disposing of forged bank-notes. The form of the indictment was the same in each case. The FIRST and THIRD counts in each (upon which no evidence was given) charged actual forgery. THE SECOND COUNT in each charged that the prisoner (1) on the fifteenth day, &c. with force and arms at *Rochdale* in the county of *Lancaster*, feloniously did *dispose of* and *put away*, a certain false, forged, and counterfeit bank-note, THE TENOR of which said last-mentioned forged and counterfeit bank-note is as followeth, (an exact copy set out) with intent to defraud the Governor and Company of THE BANK OF ENGLAND, he, the said prisoner, at the time of his so disposing of and putting away the said last-mentioned forged and counterfeit bank-note, then and there, TO WIT, on the said fifteenth day of May, in the forty-ninth year aforesaid, at *Rochdale* aforesaid, in the said county of *Lancaster*, well knowing such last-mentioned note to be forged and counterfeited, against the form of the statute, &c. &c. THE FOURTH COUNT differed

(1) James Draper.

1809.

HOLDEN'S CASE.

from the second only in describing the forged instrument to be "a promissory note for the payment of money" instead of calling it "a bank-note." In the course of the evidence it appeared that the notes in question were disposed of to *John Shaw* and *James Whitehead*, the principal witnesses against the prisoners, who, in consequence of a great number of forged bank-notes having been circulated in the neighbourhood, were employed by THE MAGISTRATES with the approbation of *the Agents* for the Bank, to detect those who were suspected to be utterers. The prisoners did not pay the notes to *Shaw* and *Whitehead* as genuine, but those persons, for the purpose of detection, *applied to the prisoners as supposed dealers in forged bank-notes to purchase them*, and the prisoners accordingly *procured them*, and sold them *as forged notes*, so that *Shaw* and *Whitehead* were not *deceived* or *defrauded* in any of the instances, nor were any of the prisoners the first movers in the transactions they had with the witnesses, neither did it appear by any direct evidence, that any of the prisoners, when he was *first applied to*, had any of the notes in his *actual possession*, but they respectively produced them at meetings, which took place subsequent to such first application. The rest of the evidence was full and satisfactory, and the four first named prisoners were convicted without any objection being taken to the form of the indictment, or to the insufficiency of the act of disposal to constitute the offence created by the statute; but upon the trial of *James Draper*, it was objected on his behalf,—FIRST, that the indictment was insufficient as being *too general*, neither stating in *what manner* or *to whom* the notes were disposed of and put away. SECONDLY, that the disposition of the notes established by the evidence was insufficient, inasmuch as the prisoners were *solicited to commit the act* proved against them, *by* THE BANK *themselves*, by means of their *agents*. On this point the prisoners' counsel referred to the case of *M'Daniel and others*, 10 *St. Trials* 432, *&c.* I overruled the objections, and the convicts all received sentence; but I thought it proper to respite execution, in order to take the opinion of

THE JUDGES upon the objections; which objections are meant to be argued by counsel. 1809.

HOLDEN'S CASE.

A. CHAMBRE, 4th *November* 1809.

THE case was argued accordingly in Michaelmas Term in the Exchequer Chamber, before THE TWELVE JUDGES, by YATES for the prisoners, and by LAMBE for the Crown.

YATES, *for the prisoners*, contended that to encourage or procure the commission of a crime for the purpose of bringing a suspected offender to punishment, is repugnant to the true principles of public policy, and unwarranted by the law of *England*; that punishment can only be inflicted as an example to prevent the future perpetration of crimes by deterring others from committing them; and that neither the Bank nor their Agents had a right to speculate upon the guilt or innocence of supposed offenders: that the facts of the case excluded the question, for they shew that the agents of the Bank were the first movers in all the transactions, and that they induced the prisoners to procure the notes, by the putting away of which the crimes are said to be committed; that in *Macdaniel's Case* (1), it was expressly decided that a robbery which had been committed upon the person of one *Salmon*, by his procurement, could not, for that reason, become the subject of a criminal prosecution, the property parted with, in such case, not having been taken against the *will of the owner*: that there the robbers had done every thing on their parts, for they were ignorant that *Salmon* had consented to be robbed; but here the Bank, by its agents, had with great industry sought out the prisoners at their respective houses, or places of resort, and had encouraged, procured, and led them into the commission of the offence; for in no one instance had any of the prisoners the forged notes upon him, at the time when the purchase was first suggested to him by the witnesses. It may be said that the cases of *Rex* v. *Norden* (2), and *Rex* v. *Eggington* (3), are authorities against this reasoning; but in the first of those cases there was no procurement, no contrivance, no communication whatever to induce the prisoner to commit the robbery; and though the

(1) 10 State Trials. Foster's C. L. 130. *Ante*, page 920, cited.

(2) Foster's C. L. 129. 2 East's C. L. 666, and cited fully, *ante*, page 921.

(3) *Ante*, page 913. Case 224.

1809.

HOLDEN'S CASE.

party robbed voluntarily parted with his money with the view and intent to apprehend the robber and convict him of the crime, he did nothing to induce the commission of it. In *Eggington's Case* the original suggestion came from the prisoners, and *Bolton* only permitted that to be done which they had originally devised and intended to carry into execution (1); but here the suggestion did not originate with the prisoners, but with the witnesses as agents for the Bank. In *Eggington's Case*, the prosecutor being informed of the intention of the thieves to rob his house, removed from the place every thing but the guineas and some ingots of silver, which he marked; but this was done with a view to detect the offenders; and not to induce or cause, as in the present case, a perpetration of the offence. The distinction therefore arising from these cases taken together is, that where the offence originates with the person to be prejudiced by it, the property cannot be said to be taken *invito domino*. [LORD ELLENBOROUGH and MANSFIELD, *Chief Justices*, desired *Mr. Yates* to shew how he could so apply this principle as to make the assent or dissent of the disponee at all essential to this offence, which is defined by the statute to be "the disposing of and putting away forged bank-notes."] In like manner it is no offence to commit a cheat, or to use a false pretence by the procurement of the person to be affected by it. A fraudulent or colluсive bankruptcy cannot be taken advantage of by the parties concerned in it (2), nor can a person be proceeded against for pulling down inclosures, if done by the owner's consent; and the same principle must prevail in cases of forgery. In the case of *Rex* v. *Ward* (3), on an information for forgery at Common Law, the Court held that although actual prejudice is not necessary to constitute the offence, yet that there must exist some person who might be prejudiced by it (4); but in the present case, there are no persons who have been, or could be, in any way, deceived or defrauded. Deceit is an essential ingredient in this species of offence, but the actors in this case, whether considered as assistants to the Crown, as agents to the Bank, or as private individuals, have not been deceived, and consequently the Bank,

(1) *Ante*, page 922.

(2) Cooke's B. L.

(3) 2 Stra. 747. 2 Ld. Ray. 1461. 2 East, P. C. 861.

(4) See Fawcett's Case. 2 East, 864.

1809.

HOLDEN'S CASE.

with whom they are identified and by whom they were employed, could not be defrauded, for they knew that the notes were forged, and could not be deceived thereby. If they had acted in this case unauthorized and of their own accord, they would have appeared as accessaries before the fact (1). The statutes against the offence of forgery in every instance (2), unite the offence with the party who is object of the meditated fraud; its creation is always accompanied by the appendage of an intent to defraud; and therefore the person or persons against whom the offence is intended to be committed, must form a material part of every consideration on this subject. There must be necessarily some person capable of being defrauded; but it is clear that no deception was practised, or intended to be practised on *Shaw* and *Whitehead*. No attempt whatever was made for that purpose; the prisoners did not dispose of the notes to them as genuine notes, but as forged notes; and if these agents were not deceived or defrauded, it is impossible that their principal, the Bank, whom they identically represent, could be defrauded: the allegation in the indictment therefore that these notes were disposed of with intent to defraud THE Governor and Company of the Bank, must be considered the same as if the allegation had been "with intent to defraud *John Shaw* and *James Whitehead*." SECONDLY, the indictment ought to have stated the *manner in which, and the names of the persons to whom*, these notes were disposed of and put away. The mere setting forth THE TENOR of the note does not convey sufficient information to the prisoner of the particular transaction with which he is charged. Considering the immense issues which have been made of late years of small bank-notes, it is not improbable that the same note may frequently pass through the same hand, and as *the day, the year*, and *the place*, have long been considered immaterial (3), it is necessary that the name of the person to whom a forged note is disposed of should be inserted. In the case *Rex* v. *Jones*, the indictment, like the present, charged, that the prisoner, having in his custody a certain forged paper writing, purporting to be a BANK-NOTE, did dispose of and put away the same, without saying *to whom*, and it was held bad, although the special verdict found, that

(1) See Eggington's Case, *ante*, page 919.

(2) See 2 Geo. II. c. 25. 7 Geo. II. c. 22. 15 Geo. III. c. 13. s. 11. 18 Geo. III. c. 18. 45 Geo. III. c. 89.

(3) See 4 State Tr. 570. Foster, 8, 9. 3 Inst. 230. 1 Hale, 361. 2 Hale, 179, 291. 1 East, P. C. ch. 2. s. 60.

1809.

HOLDEN'S CASE.

he had put away the same to *James Rayner*; the finding of the verdict being held not sufficient to cure the defect of the indictment. It is observable also that the indictment in *Jones's Case*, charged the prisoner with having disposed of and put away the note "as and for a true bank-note, knowing it was forged," which allegation would, in this case, not have been true: Yet the words of 15 Geo. II. c. 13. s. 11. on which that indictment was founded, are precisely the same with those in 45 Geo. III. c. 89. s. 2. on which the present indictment is drawn. It is true this indictment contains every word which the statute uses for constituting the offence (*a*); but there are many cases where that is insufficient, as in the case of *Rex* v. *Mason* (1), on the 30 Geo. II. c. 24. where the indictment was held bad in not having stated what the false pretence was by means of which the fraud was effected, although the statement is not required by the words of the statute. So an indictment for arson on 9 Geo. I. c. 22. must aver, that the house was set fire to "wilfully and maliciously," though the insertion of these words are not made necessary by the statute. So again on 9 Geo. I. c. 22. for sending a threatening letter, the letter must be set out (2). In the case of *Ann Pope* (3), an indictment on 3 Will. & Mary, c. 9. s. 5. for robbing a ready furnished lodging, was held insufficient because it did not state *by whom* the lodging was let, though it had used all the words in the Act descriptive of the offence. And in an anonymous case (4), on the 8 and 9 Will. III. c. 26. s. 6. for putting off counterfeit milled money, the indictment did not state the *names of the persons* to whom the money had been put off; and HOLT, *Chief Justice*, said the names of the persons, if known, ought to be mentioned and laid specially; though the statute says "to any person or persons (*b*)." It is therefore necessary that

(1) *Ante*, page 487. Case 224.

(2) Rex v. Robinson, *ante*, page 749. Case 294.

(3) *Ante*, 336. Case 144.

(4) 1 East, 180. from the MS. of Mr. Justice Tracy.

(*a*) This observation was made by LORD ELLENBOROUGH, and admitted by Mr. Yates.

(*b*) LORD ELLENBOROUGH, *Chief Justice*, and LAWRANCE, *Justice*, observed that the statute 45 Geo. III. c. 89. s. 2. on which the present indictment is founded, does not contain the words "to any person or persons," but only "dispose of or put away any such forged note with intent to defraud the Governor and Company of the Bank of *England*."

these allegations should have been inserted in this indictment, in order that the prisoner may have notice of the precise charge he is called upon to answer.

LAMBE, *for the Crown.* As to the objection which has been suggested against the form of the indictment, it may be sufficient to say that THE PRECEDENT (*a*) from which it was drawn was settled and approved of by the ablest lawyers of the day; that it has been in use for almost half a century; and that many prisoners have been convicted upon indictments thus framed, and have suffered the penalties of the law. It states the offence in the very words in which it is described by the statute; it sets out THE TENOR of the forged note which the prisoners are charged with having feloniously and knowingly disposed of and put away; and it avers, in the language of the Act, that this was done, "with intent to defraud the Governor and Company of the Bank of *England.*" The law requires only so much certainty in an indictment as is sufficient to afford to the prisoner clear and precise information of the nature and extent of the charge, which he is thereby called upon to answer; and this degree of information is fully given by the present indictment. The insertion of the name of the person to whom the note was put away is not required by the statute; nor could it, if it were inserted, convey more full intelligence of the nature of the offence than is at present given by the setting forth a copy of the forged note, in the very words and figures of it (1). The very cases that have been cited on the other side, on the statutes 30 Geo. II. c. 24. and the 9 Geo. I. c. 22. admit that if THE TENOR of the threatening letter, and THE TENOR of the false pretence be respectively set out, it is sufficient. In the anonymous case respecting the putting away counterfeit guineas "to divers persons unknown," it is observable that several felonies were included in one count; and though HOLT, *Chief Justice*, said that the names of the persons to whom the monies were disposed of ought to have been inserted if known, yet he proceeded to try

(1) That averments not material need not be stated, see *ante*, page 942.

(*a*) See this precedent, 2 Starkie's Criminal Pleadings, page 486, No. 134.

1809.

HOLDEN'S CASE.

the prisoner, and she was convicted on that indictment. The precedents in *Tremain*, and other ancient entries, do not state *to whom* the forged note was uttered or published, but only, as in the present case, that it was uttered or published with intent to defraud. As to the case of *Rex* v. *Jones*, the question there was not upon the form of the indictment, but whether the forged paper writing which he was charged with having knowingly uttered, as and for a bank-note, did or did not purport to be a bank-note; and the Court held, from its want of proper similitude, that it did not purport to be the sort of note which he had falsely represented it to be. But if it had borne sufficient similitude to a bank-note, the indictment would have been good, though it did not state *the name of the person* to whom it was so uttered. The offence of uttering, or disposing of, or putting away a forged note, does not consist in actually defrauding any person, but in the intent to defraud, and although the prisoners did not intend to defraud either *Shaw* or *Whitehead*, by passing these notes to them as good and genuine notes, yet they put them away at *an under price*, with the expectation that these purchasers would dispose of them again, and thereby certainly, through them, intended to defraud the Bank. Suppose *Shaw* and *Whitehead* to have been employed in this business, with the concurrence of the Bank, of which however there was no evidence given at the trial, it does not follow because they, as agents, were not deceived in the articles they purchased, that therefore the Bank could not *possibly* be thereby defrauded: they might, for instance, instead of keeping the forged notes so purchased in their own possession, have fraudulently circulated them, and by that means the Bank might possibly have been defrauded, which *possibility* is all the law requires to constitute this offence. This is not a solitary case; many persons have been convicted of uttering notes bought for the purpose of convicting them. In the case of *Rex* v. *Palmer* and *Hudson* (1), the Judges held that the delivery of the forged note by *Palmer* to *Mary Hudson*, with the view and under the expectation that she would dispose of it for his benefit, was, on his part, a completion of the

Ante, page 204. Case 103.

(1) *Ante*, page 978. Case 338.

offence. It may be observed also, that the object of *Shaw* and *Whitehead* was not to obtain from the prisoners these particular notes, but generally to detect all such persons as were concerned in circulating forged bank-notes. 1809. HOLDEN'S CASE.

YATES, *in reply*.—The bare possibility that these servants of the Bank might, in violation of the trust reposed in them, have put the notes they purchased into fraudulent circulation, will not alter the nature of the question, or in any way render this offence of the utterers complete. It would be putting the lives of persons in the power of the Bank and their agents. The case before LORD HOLT, of putting off counterfeit guineas, may be accounted for by considering that the offence there charged is an act of treason against the state, and not, like forgery, an offence against individuals only: and as to the case of *Rex* v. *Palmer* and *Hudson*, the only question there was, whether *Palmer* was an accessary before the fact, or a principal; and if he adopted the act of *Mary Hudson* he was the utterer: but it never could be alleged or proved that he uttered the note with intent to defraud her, for she in that case, like the purchasers in this, knew the note to be forged and counterfeited.

No opinion was publicly delivered, but the prisoners were executed according to their sentence.

THE KING *against* WILLIAM HEADGE.

CASE OCCXLV.

AT the Old Bailey, in September Session, 1809, *William Headge* was tried before MR. JUSTICE BAYLEY, on the statute 39 Geo. III. c. 85. for embezzling and stealing three shillings, the property of his masters, *James Clarke* and *John Gyles*, on the 22d August, 1809.

If a servant secrete monies which his master has marked and sent by a friend, to make a purchase at his shop, with a view to try the honesty of his servant, it is a *felonious breach of trust*, and an *embezzling* within 39 Geo. III. c. 85. and not a *larceny at Common Law*.

THE EVIDENCE.—The prosecutors were oil and colourmen, and having cause to suspect that the prisoner, who was their shopman, was in the almost daily practice of embezzling their property, by putting the monies he received in the

1809.

HEADGE'S CASE.

shop on their account into his own pocket, instead of into their TILL, Mr. *Gyles*, on the day above-mentioned, took an account of the money then in the till, and left therein one half-crown piece and one shilling, both of which he marked by punching the letter Y on the surface of each. Immediately afterwards, he took three single shillings out of his own pocket, which he marked in the same manner, and then carried the three shillings to the house of his neighbour, Mrs. *Ann Roskett*, and gave them to her servant, *Frances Moxon*, who, by his desire, and the orders of her mistress, went with them to the shop of the prosecutor, and purchased of the prisoner, who was then serving in the shop, some articles to exactly that amount, and paid to the prisoner the same three shillings which Mr. *Gyles* had so marked and given to her for the purpose. In a short time afterwards the prosecutor re-examined THE TILL, and found therein only the half-crown piece and the shilling which he had before left there. Without questioning the prisoner on the subject, he immediately sent for a constable and took him into custody; and on searching him, there were found upon him a gold seven-shilling piece, thirteen single shillings in silver, and also the very three marked shillings which he had so received from Mrs. *Moxon* recently before on his master's account. The detection produced from him a voluntary and full confession of his guilt, not only as to the marked three shillings, but as to the other monies which were found upon him.

See Rex v. Whittingham, *ante*, page 912. Case 324.

ALLEY, *for the prisoner*, submitted to the consideration of the Court, that as these three marked shillings were the property of the prosecutor, and had been taken out of Mr. *Gyles*'s own pocket, for the sole purpose of trying the fidelity of the prisoner, the delivery of them to *Frances Moxon* had not changed the *possession* of them, which, he contended, remained constructively with the prosecutors up to the moment when the embezzlement took place; and therefore, that the charge should have been for a *larceny at common law*, and not for *an embezzling* under the statute 39 Geo. III. c. 85. which, he submitted, extended only to cases where the money embezzled had been paid to the servant for

1809.

HEADGE'S CASE.

or on account of his master, by some *third person*, and not where the prosecutor's money, as in this case, had been put into the prisoner's hand by the master himself, by means of his agent *Frances Moxon*.

THE COURT over-ruled the objection, and the Jury found the prisoner guilty; but the case was saved for the opinion of THE TWELVE JUDGES.

MR. JUSTICE GROSE, in December Session 1809, delivered the opinion of the Judges to the following effect:—The question upon this case is, whether the offence of which the prisoner has been convicted be a *breach of trust* within the reach of the statute 39 Geo. III. c. 85. on which the indictment is founded, or whether, as it was contended at the trial, it be *a larceny at common law*. The money was, unquestionably, the property of the prisoner's master, who marked it, and delivered it to *Frances Moxon*, who, according to his directions, and as his agent, purchased sundry articles with it of, and paid it to, the prisoner for the use of his master: the prisoner, however, instead of putting it into his master's till, or applying it in any way to his master's use, secreted and embezzled it, and converted it, at the very moment he received it, to his own use, by putting it into his pocket, where it was immediately afterwards found. Upon looking into former cases of this sort, it appears that there is one exactly similar in its circumstances to the present; namely, the case of *Thomas Bull* (1), who was tried by MR. JUSTICE HEATH at the Old Bailey, in January Session, 1797, for a common law *larceny*, in stealing a half-crown and three shillings, the property of his master, a confectioner, in *Cheapside*. In that case, his master employed a friend to go to his shop with money of his own, which he had previously marked, for the purpose of purchasing confectionary, which he did, and the same money was immediately afterwards found upon the person of the prisoner. The case was reserved for the opinion of the Judges, who held that it was a *breach of trust* and not a *larceny*, for the money so secreted had not been taken from *the possession* of the master; it never having been in his possession; and as there was not at that time any legislative

(1) *Ante*, page 841, cited.

1809.

HEADGE'S CASE.

provision for the punishment of this species of offence the prisoner was discharged. It was then only a breach of trust. But the statute 39 Geo. III. c. 85. having now declared it to be a larceny in any servant who shall, in that capacity, receive money for or on account of his master, and shall fraudulently embezzle the same, although such money was no otherwise received into *the possession of such master*, than by the *actual possession of his servant*, this is a case, clearly within the Act; for it appears from *Bull's Case*, that the present, which is precisely similar in its circumstances, is not a case of larceny at common law, but a breach of trust, and as such is within the terms and operation of the statute. I am therefore directed by the Judges to say that they are of opinion that the conviction is right.

CASE CCCXLVI.

THE KING *against* HENRY CLARKE.

The *paper* and *stamps* of the notes of a country bank which have been paid by the correspondent banker in *London*, and which the country banker may legally reissue, are the *valuable property* of the country banker while *in transitu* for the purpose of being reissued.

See Aslett's Case, *ante*, page 958. Case 336.

AT the Old Bailey, in February Session, 1810, *Henry Clarke* was tried before THE RECORDER for larceny. The indictment consisted of six counts. THE FIRST COUNT charged, That *Henry Clarke*, on the 2d January, 1810, did feloniously steal 135 *promissory notes* for the payment of one pound each, of the value of one pound each; 184 promissory notes for the payment of five pounds each, of the value of five pounds each; and 77 promissory notes for the payment of ten pounds each, of the value of ten pounds each; the said notes being the property of *Joseph Large*, *James Large*, and *Abbot Large*, and the sums of money payable and secured thereon being then due and unsatisfied to the said *Joseph*, *James*, and *Abbot Large*, the proprietors thereof, against the statute, &c. THE SECOND COUNT stated the said notes to be the property of *Timothy Brown*, *Thomas Cobb*, and *George Cobb*. THE THIRD COUNT stated them to be the property of the coach-masters, *William Waterhouse*, *Thomas Bolton*, *William Hanton*, and *Richard Banks*. THE FOURTH COUNT charged, that he *Henry Clarke* feloniously did steal 135 *pieces of paper*, each being stamped with a stamp of four shillings, value four shillings, being the stamp directed by the statute in such case made and

1810.

CLARKE'S CASE.

provided on every promissory note for payment to the bearer on demand, of any sum of money not exceeding one pound one shilling; 184 *pieces of paper*, each being respectively stamped with a stamp of one shilling, being the stamp, &c.; and 77 *pieces of paper*, each being respectively stamped with a stamp of one shilling and sixpence value, being the stamp, &c.: all the said *pieces of paper* being so stamped as aforesaid, and being the property of *J. J.* and *A. Large*; and each and every of the said stamps being then available and of full force and effect; against the peace, &c. THE TWO OTHER COUNTS were the same, only laying the property respectively as in the Second and Third Counts.

THE EVIDENCE.—The prosecutors, Messrs. *Large and Co.* were copartners, carrying on the business of bankers at *Wotton Basset:* and *Brown and Cobbs* were their correspondent bankers in *London*; and at whose house in *London* all the notes, issued by the banking-house at *Wotton Basset*, were made payable. During the week preceding, the 2d January 1810, the house of *Brown and Cobbs* paid 135 one-pound notes; 184 five-pound notes; and 77 ten-pound notes, drawn on them by Messrs. *Large and Co.* at *Wotton Basset.* All these *paid notes* were securely made up into one parcel, directed "*To Messrs. Large and Son, Bath*, per mail," and delivered on 2d January to the book-keeper of the Bath mail, for the purpose of its being forwarded, by *Large and Son*, of *Bath*, to the banking-house at *Wotton Basset*, in order that the said paid notes therein inclosed might be reissued from the *Wotton Basset* Bank, according to the statutes of 44 Geo. III. c. 98. and 48 Geo. III. c. 149. s. 13. (*a*). The parcel was accordingly sent by the Bath mail on the same day; but it never reached either *Bath*, or *Wotton Basset:* and *Large and Co.*

(*a*) These statutes enact, that bankers shall be permitted to reissue their promissory notes, not exceeding 2*l.* 2*s.* indefinitely, and promissory notes exceeding 2*l.* 2*s.* and not exceeding 100*l.* during a term of three years from the dates thereof respectively; and that the said notes shall, *after the reissuing the same*, be as good and valid, and as available in the law to all intents and purposes, as they were upon the first issuing thereof, and before any payment of them has been made.

1810.

CLARKE'S CASE.

were under the necessity of issuing other notes on fresh stamps, instead of those which were inclosed in this parcel. On the 6th January, 1810, the prisoner purchased some drapery of Mr. *Stroud*, a linen-draper, in *Holborn*, and paid him one of the ten-pound *Wotton Basset* Bank notes which had been inclosed in the parcel. On being questioned how he had got this note, he said that his name was *Charles Smith*; that he was the son of *John Smith*, a farmer, living only a very short distance from *Wotton Basset*; and that his father had given it to him on his leaving the country, to pay his expenses while in town; but Mr. *Stroud* suspecting, from his manner and appearance, that his tale was untrue, he detained the note, and gave information to *Brown and Cobbs*. It appeared also that he had put off, at *Branscomb's* Lottery-office, under a very different representation of himself, another of the notes that were in the parcel; and it was proved that he had shewed a number of the other notes so missing to one *Edward Gordon*, a private in the West London Militia, to whom he offered a premium to assist him in putting them into circulation, but who, instead of so doing, apprehended him, and delivered him, on the 22d January, into the custody of a City Marshal.

THE COUNSEL *for the prisoner* objected, that the charge being for a larceny, the law required that the property stolen should be of some value; that the notes in the present instance having been paid, they were become, both with respect to the money they were intended to secure, as well as to the stamps, mere waste paper; that their former value was extinct; and that before they could again become valuable property, it was necessary they should have been actually *reissued* by the firm of the *Wotton Basset* Bank; but that not having reached the point at which they could legally be regenerated, and again converted into that species of property which is protected by 2 Geo. II. c. 25. they were of no value, either as to the paper, or the stamps; and of course could not be the subject of larceny.

SECONDLY, That the evidence did not sustain the counts for stealing *the stamps*, for the stamps having been used, they were now not in any way saleable as stamps; that they had

1810.

CLARKE'S CASE.

not been converted, at the time they were stolen, to any other purpose than that for which they had already been used; that their operation as stamps was completely finished and at an end; and that they could not reassume the character of stamps, until the notes, to which they were affixed, had undergone the process of being reissued.

THE Jury found the prisoner guilty; but judgment was respited, and the case referred to the opinion of the Judges.

MR. JUSTICE GROSE, in June Session, after stating the indictment and the evidence, delivered the opinion of the Judges shortly as follows:—The question submitted in this case to the consideration of the Judges was, whether the paper and the stamps are, under the circumstances of the case, the subjects of larceny at common law; or, in other terms, whether they are *the property of, and of any value* to *James, Joseph,* and *Abbot Large,* who were unquestionably the owners of them. These gentlemen had paid for the paper, the printing, and the stamps of these papers, which once existed both in character and in value as promissory notes. Their character and value as promissory notes were certainly extinct at the time they were stolen; but, even in this state, they bore about them a capability of being legally restored to their former character and pristine value. It was a capability in which these owners had a special interest and property. The act of reissuing them would have immediately manifested their value as papers, for it would have saved their owners the expense of reprinting other notes, and of purchasing other stamps, to which expense it was proved they were put on their being deprived of these papers by the crime of the prisoner. In what sense or meaning, therefore, can it be said that these *stamped papers* were not the valuable property of their owners? They were, indeed, only of value to those owners; but it is enough that they were of value to them: their value as to the rest of the world is immaterial. The Judges therefore are of opinion, that, to the extent of the price of the paper, the printing, and the stamps, they were valuable property belonging to the prosecutors; and that the prisoner has been legally convicted.

CASE CCCXLVII.

If the *London* correspondent of a country banker fail, and the notes of the country bank, then in circulation, be directed to be paid at another house; the *altering of a* paid note, (lost on its way to the country bank, in order to be reissued,) as to its *place of payment*, is a forgery: and the drawer of it may prove that it never reached his hands, or was reissued by him.

See S. C. 2 Taunton, 328, and the preceding case of Rex v. Clarke, 1036.

THE KING *against* WILLIAM TREBLE.

AT the Lent Assizes at *Horsham*, in the year 1810, *William Treble* was tried before MACDONALD, *Chief Baron*, on an indictment containing nine counts for the several offences of forging, uttering, disposing of, and putting away as true a certain false, forged, and counterfeited promissory note for the payment of money, THE TENOR of which is as follows:

"FORDINGBRIDGE, 1 *July*, 1808.

"I PROMISE to pay the bearer on demand TEN POUNDS here, or at Messrs. *Ramsbottom, Newman, Ramsbottom and Co.*

For *Francis, John*, and *James Kelleway*.

"JOHN KELLEWAY."

with intent to defraud 1st. Messrs. *Hawkins and Phillips*, 2dly, Messrs. *Kelleway*, 3dly, Messrs. *Ramsbottom and Co.*

THE EVIDENCE.—The prosecutors, *F. J. and J. Kelleway*, bankers, at *Fordingbridge*, in *Hampshire*, had, for several years previous to the month of September 1809, made the notes of their bank payable "on demand to the bearer at *Fordingbridge*, or at *Sir Matthew Bloxam and Co.'s*, bankers, in *London*." In this their original and printed form, they continued, from time to time, to reissue them, by authority of the statutes 44 Geo. III. c. 98. and 48 Geo. III. c. 149. s. 13. after they had been paid by, and received back, from their London correspondents. Unfortunately, however, about the month of September 1809, the banking-house of *Sir Matthew Bloxam* was under the necessity of stopping payment, and the partners were declared bankrupts. On this event it was necessary that the *Kelleways* should appoint some other banking-house in *London*, at which their notes should be thereafter made payable; and the banking-house of *Ramsbottom and Co.* was chosen for that purpose. But in order to save the expense of engraving a new plate, as to the whole subject of their notes, and of reprinting them conformably to this appointment, they procured a small plate to be engraved with "*Messrs. Ramsbottom and Co.*" on

1810.

TREBLE'S CASE.

it, and worked off from the plate those words only on small slips of thin paper, which they fastened, with a cement, on their already printed notes, over the words "*Sir Matthew Bloxam and Co.*" It happened that this house had, previous to its failure, paid, to the amount of 750*l.*, a number of these notes of the *Fordingbridge Bank*, which had been made payable at the house. These paid notes were, in the month of June 1809, inclosed in a paper parcel, directed "To Messrs. *Kelleways*, bankers, at *Fordingbridge*," and delivered at the *Swan with two Necks* in *Lad-lane*, to be conveyed to them by the coach, for the purpose of affording the *Kelleways* an opportunity of reissuing them. The parcel was safely delivered into the coach; but it was either lost or stolen on the road between *London* and *Salisbury*; and never reached the hands of any person belonging to the *Fordingbridge Bank*. The note charged in the indictment was one of the notes so contained in this parcel, which note, it was clearly proved, the prisoner had uttered under circumstances which denoted his knowledge of the alteration that it had on it; for it had, at the time, a slip of thin paper, with the words "*Ramsbottom and Co.*" printed on it, and pasted over the words "*Bloxam and Co.*" precisely like the printed slips of paper which the prosecutors had affixed to other notes of the like kind which had been issued by them. On searching the prisoner, at the time he was apprehended, many other of the paid notes which had been inclosed in the said parcel were found upon him. One of the partners in the *Fordingbridge Bank* was admitted to prove that the parcel had never been delivered to their house, or had come to the hands of any of the partners, or to the hands of any other person on their account. Of course the note thus altered could not be one of the notes to which the partners of this country bank had themselves affixed the words "*Ramsbottom and Co.*" over the words "*Sir Matthew Bloxam and Co.*" It was also proved, by the driver and the guard of the coach, that this particular parcel had been taken from the coach, or lost on the road, before it arrived at *Salisbury*.

KNOWLYS, *for the prisoner*, objected, 1st. That this alteration did not amount to the offence of forgery. 2d. That no

1810.

TREBLE'S CASE.

partner in *Kelleways'* house could be a competent witness to prove even indirectly that the alteration was not made by himself or partners.

THE Jury found the prisoner NOT GUILTY of the *forgery*, and GUILTY on all the other counts; but, on the above objection, the case was saved for the opinion of THE TWELVE JUDGES. It was argued in the Exchequer Chamber on the 29th May 1810, before eleven of the Judges, MR. JUSTICE BAYLEY being absent.

KNOWLYS, *Common Serjeant*, for the prisoner, argued, that to constitute the offence of forgery, the alteration must be in a material part of the instrument (1); as, if the obligee of a bond conditioned for the good behaviour of his apprentice, alter the penalty from *pounds* to *marks*, it is not forgery, for it makes the bond void, and diminishes the duty to himself, the alteration being without any apparent design to defraud another. But if he had increased the sum with a view to his own advantage, or if he had even diminished it with intent to prejudice a third person, it would have been forgery. So in a conveyance of the manor of *Dale*, if it be altered by making it a conveyance of "the beautiful manor of *Dale*," it is no forgery, because the words inserted are wholly immaterial. So in the present case the alteration made in this note is not an alteration in a material part of it, as in the case of *Masters* v. *Miller* (2): if the alteration had accelerated the day of payment it might have been forgery, but not so where the day of payment is not accelerated (3). The alteration made in this note respects merely the place of payment; but the place of payment is not essential to the validity of the note: the contract between the parties is the payment of the note, and it is immaterial at what *place* it is paid. In a declaration on a promissory note it is not necessary to shew the place where it is payable. To render a bill valid, it is only necessary to shew that the holder has the opportunity of resorting to a solvent person; and, in this case, there is a solvent person, who may be resorted to for the payment of the note, namely, the banking-house of Messrs. *Kelleways*, at *Fordingbridge*, for it certainly is not obligatory on

(1) Hawk. c. 70. ss. 2 and 4. 3 Inst. 169. Blake *v.* Allen, 2 Mod. 619.

(2) 4 Term Rep. 320. 337.

(3) Jackson *v.* Pigot, Carth. 459.

2 East's C. L. c. 19. s. 4.

1810.

TREBLE'S CASE.

the bankers in *London* to pay it. But the bankers in the country stand in a very different situation: it is their note, and whether the alteration which has been made in it is or is not a forgery, depends upon the question whether they are or are not liable to pay it. This is the true criterion upon the subject; and it cannot be questioned but that they are still liable thereon. The Legislature, therefore, cannot be supposed to have intended that the punishment of death should be inflicted upon a mere intent to defraud, where the act, when completed, never can defraud, but leaves the instrument such, that after the prisoner's death the holder may still enforce it by law; for a holder who is intitled to recover can never be said to be defrauded. Suppose this note had been presented at *Ramsbottom and Co.'s*, and they had paid it, they would, as innocent holders of this note for a valuable consideration, have been intitled to receive its amount against the drawers. If this note had reached the house of the drawers it would have been reissued; how, therefore, can the drawers be defrauded? for the alteration only directs *where* the payment of it is to be made: the promise of the drawers to pay it is genuine, and the place of payment is not essential to the contract.—BUT, SECONDLY, there is not sufficient to prove that this alteration on the face of the note was made without the authority of Messrs. *Kelleways*. It is true that *John Kelleway* was only called to prove that the parcel containing these paid notes was never received; but it followed, as an unavoidable consequence, that if it was not received, the note in question could not have been reissued by them, and that, by necessary implication, the alteration could not have been made by the house. This evidence, therefore, is precisely the same as if he had been called to prove that the signature to the note was not the signature of the firm of the house, which he was not a competent witness to prove; and a party who cannot be called directly to prove that the note is a forgery, cannot be permitted to do it indirectly (1).

See the argument of LENS, S. upon this point, Rex v. Crocker, *ante*, page 991.

(1) Rex v. Bunting, 2 East, 996.

GURNEY, *for the Crown*.—The objection to the competency of *Kelleway*'s testimony is certainly unsupported, unless the

1810.

TREBLE'S CASE.

principle of *Rex* v. *Bunting* has been carried much farther than it appears, by that case, to have gone.

MANSFIELD, *Chief Justice*.—The loss of the notes was sufficiently proved by the guard and the coachman, without the testimony of *Kelleway*, for when the coach reached *Salisbury* they discovered that the parcel was gone. But *Kelleways* were not interested, for *Ramsbottoms* had not paid the note, and therefore the question is not whether, if they had paid it, the *Kelleways* would have been interested in swearing that they had never authorized the payment, on the ground that a commission would be due to *Ramsbottoms*, in addition to the amount of the note; but here, since *Ramsbottoms* have not paid the note, whoever might hold it, equally had a claim on *Kelleway*, and *Kelleway* was therefore disinterested.

GURNEY, as to the first point, argued, that the alteration of *the place* where the note is made payable is not immaterial; for it gives the bill a degree of credit, which, without this alteration, it would not have possessed (1). Any alteration which may induce persons more readily to take the note, is, on that account, material to the instrument, and therefore such a fictitious and counterfeited alteration is forgery (*a*). By this alteration the prisoner falsely represents that the makers have undertaken to pay it at Messrs. *Ramsbottoms*, and thereby gives it the greater currency; a currency which it would not have possessed if it had continued in its unaltered state. But it is contended that this note could not defraud the drawers, but that if *Ramsbottoms* had paid it they would have been defrauded, for it would have been a payment in their own wrong, and they could not have recovered its amount from the drawers. The prisoner has knowingly uttered a *false instrument*, and this case differs not from the common case of drawing a bill on a banker in the name of a fictitious person, for which many offenders have been condemned.

(1) 2 East's P. C. c. 19. s. 47.

(*a*) See Rex *v.* Dawson, 2 East, P. C. 978. and Teague's Case, 2 East, 979. that the alteration of *any part* of a true instrument for a fraudulent purpose may be laid as a *forgery* of the whole instrument, though the 7 Geo. II. c. 22. has the word *alter* as well as *forge*.

1810.

TREBLE'S CASE.

KNOWLYS, *in reply*, contended that the *alteration* which had been made could not be considered a forging of the instrument; and that, at all events, *Kelleway*, the drawer of it, was not a competent witness to prove it, or even to add weight to the testimony of others, as to any fact from which the forgery might be inferred, for that it is impossible to say what degree of credit the Jury gave to the respective witnesses to induce the finding of this verdict. But the argument that this alteration is a forgery, because it gives a degree of credit which it would not otherwise possess, cannot be sustained, for the only credit to which the law looks on this subject is confined to the number of persons who are legally liable and responsible thereon, and not to their good faith, their superior opulence, or their credit in the opinion of the public. Thus, if a genuine Bill of Exchange, with six indorsements on it, is put into circulation, and it turns out that three of those indorsements are fictitious, that would clearly be a forgery, because it purports that six persons are legally responsible to the holder, when, in fact, only three of them are legally liable; but the alteration in the present instance does not increase the number of persons who may be sued on this instrument. These are the only circumstances from which the law makes any inference respecting the credit of the note, and any further credit arising from other circumstances or representations concerning it will not make this alteration a forgery.

LORD ELLENBOROUGH, at the Lent Assizes for Sussex, 1810, delivered the opinion of the Judges, *viz.* that the act done by the prisoner was a false making, in a circumstance material to the value of the note, and its facility of transfer, by making it payable at a solvent instead of an insolvent house.

THE prisoner afterwards received sentence of death.

CASE CCCXLVIII.

The statute 48 Geo. III. c. 129. s. 2. which repeals the 8 Eliz. c. 4. was not intended to alter the offence of robbery at Common Law, but merely to make *privately stealing from the person* not a capital offence.

THE KING *against* JOSEPH PEARCE.

AT the Old Bailey, in April Session 1810, *Joseph Pearce* was tried before LORD ELLENBOROUGH for *stealing*, on the 22d March, at *St. George's, Hanover-square*, a pocket-book, value five shillings; a handkerchief, value two shillings; and a pair of gloves, value one shilling, the property of *Charles Thompson*, from his person.

THE prosecutor, on the 22d March 1810, was walking up *Old Bond-street*, between the hours of eleven and twelve o'clock at night, when the prisoner reeled against him in a sort of way that made the prosecutor imagine that he was intoxicated. The force, however, of this reel drove him violently against some adjacent pallisades, which put him off his balance. While he was in this state, three other men immediately came up around him, two of the four taking their stand before, and two of them behind him, and all of them hustling him; during which time, one of them contrived to rifle him of his pocket-book, his pocket handkerchief, and his gloves, and then ran away; but which of them it was who so took the things he could not tell. He, however, immediately pursued them and seized the prisoner, who then appeared perfectly sober, and delivered him into the custody of the constables at the *Mount-street* watch-house. The prosecutor was positive as to the prisoner being the man who first reeled against him, but he thought that the man who rifled his pockets was one of those who had got away.

THE Jury found the prisoner guilty; but a doubt arising whether, as the property had been taken either by the prisoner or his accomplices, from *the person* of the prosecutor, without knowing which of them it was, under such circumstances, and without using such a degree of force as is necessary to constitute the crime of ROBBERY, he could be convicted on 48 Geo. III. c. 129. s. 2. the point was saved for the consideration of THE TWELVE JUDGES.

THE statute enacts, "That every person who shall, at any time or in any place whatever, feloniously steal, take, and

1810.

PEARCE'S CASE.

carry away any money, goods, or chattels from *the person* of any other, whether privily without his knowledge or not, but *without such force or putting in fear as is sufficient to constitute the crime of robbery*; or who shall be present, aiding and abetting thereto, shall be liable to be transported for life, or for such term of years, not less than seven years, as the Judge or Court before whom any such person shall be convicted shall adjudge; or be imprisoned for any term not exceeding three years."

Mr. Justice Grose, in June Session 1810, delivered the opinion of the Judges.—It clearly appears, in this case, that there was a felonious taking from the person of the prosecutor, but that the taking was without that degree of force, violence, and intimidation which is necessary to constitute the crime of robbery at Common Law. The offence, therefore, can only be punished as a common larceny. But the Noble Lord who tried the prisoner referred the consideration of the case to the Judges on a question, raised by the prisoner's Counsel, whether, as it was uncertain whether the property was taken by the prisoner himself, or by one of his accomplices, he could, under the terms and meaning of the statute 48 Geo. III. c. 129. s. 2. be legally convicted. Looking at this charge as it is laid in the indictment, and observing at the same time the words of the statute, it is clear that the Legislature did not mean to alter the law respecting *robbery*.—The intention was only to alter the species of larceny created by 8 Eliz. c. 4. from a capital punishment to transportation. The 8 Eliz. c. 4. was confined to the person who actually committed the fact, and did not extend to accessaries, or to those who were present, aiding and abetting the perpetration of the offence (1); but the 48 Geo. III. c. 129. makes the principals in both degrees equally culpable. The Judges, therefore, are unanimously of opinion, that the offence is properly charged as a taking from the person without force; that the prisoner is properly convicted; and that he may be punished by transportation according to the direction of the statute.

(1) Rex v. Baynes, *ante*, page 7. Case 3. Rex v. Sterne, *ante*, page 473. Case 217. Rex v. B. Murphy, *ante*, page 266. Case 132.

1812.

CASE CCCXLIX.

THE KING *against* THOMAS COLLICOTT.

An indictment for forging a stamp need not set out the impression or inscription on it, or name the duty it denotes: stating it to be a stamp provided by such a statute is sufficient. Engraving a counterfeit stamp, like in some part to a genuine stamp, and unlike in others, and then cutting out the unlike parts, and concealing the part cut out, and then uttering it, is a forgery and guilty uttering.
4 Taunton, 300.

AT the Old Bailey, in January Session, 1812, *Thomas Collicott* was indicted on the statute 44 Geo. III. c. 98. before MR. JUSTICE LE BLANC, for forging and uttering medicine stamps; and the indictment was tried before a *London Jury*, the offence being laid to have been committed in that city.

THE indictment consisted of seven counts. The first count charged, That the prisoner, on the 1st November, 1811, feloniously did forge and counterfeit, &c. *a certain mark* provided and used in pursuance of a certain Act of Parliament, intitled, &c. The second count charged, that he did feloniously utter *a certain paper* with a forged and counterfeit mark, which mark was forged and counterfeited to resemble a certain mark provided and used in pursuance of the said Act, he well knowing the same mark to be forged. The third count was for knowingly vending and selling a certain paper with a forged mark, &c. The four remaining counts were the same as the former, except that they described it as *a stamp* instead of *a mark*: and all the counts laid the intention to be to defraud his Majesty of the duties charged and imposed by the said Act.

THE EVIDENCE.—The prisoner kept a medicine warehouse in *Oxford-street*, in the county of *Middlesex*, and on the 1st of November 1811, he made up a package of patent medicines, some in boxes and others in bottles, but all of them with these counterfeit stamps pasted on the outside of each; and after directing it "To Messrs. *Wood* and *Cunningham*, at *Bath*," from whom he had previously received an order so to do, he gave it to his porter, *Joseph Harding*, to carry to the *Castle and Falcon* Inn, in *Aldersgate-street*, in the city of *London*, in order that it might be conveyed by *Rogers's* Waggon to *Wood and Cunningham*, the innocent vendees at *Bath*, and which the porter delivered at that inn accordingly. The package arrived at *Bath* in due course of time, where it was opened by Mr. *Wood*, and the several boxes and bottles of

1812.

COLLICOTT'S CASE.

medicines, with the stamps pasted on them, were taken out and exposed to sale. A short time afterwards, however, Mr. *France*, from the Stamp-Office, called at *Wood and Cunningham*'s, and there found these medicines with false stamps on them, as before-mentioned. On searching the prisoner's warehouse on the 6th December, a large quantity of the same kind of stamps were found concealed in an apron in the coal-hole of the front area of his house. The labels that were so pasted on the bottles and boxes found at *Wood and Cunningham*'s, at *Bath*, as well as those which were found at the prisoner's warehouse in *Oxford-street*, were proved to be impressed with forged and counterfeited stamps. These stamps were of an oblong form, coloured with red ink, similarly to the stamps issued by Government for patent medicines, and having, like them, at one end, the word "STAMP," and at the other end the word "OFFICE," printed transversely; and on a blank on the first-mentioned end, printed longitudinally, the words "*Value above one shilling;*" and on a blank on the other end, also printed longitudinally, the words "*not exceeding* 2*s.* 6*d.*" as the legal stamps also have. The legal stamps have in the centre a circle, which in the counterfeit was all blank, except that it bore the words "*Jones, Bristol,*" painted thereon; whereas in the legal stamp that circular space was circumscribed with a red ring, and incribed with another smaller red ring, and in the circular space between the two rings were printed the words "*Duty three-pence;*" and on the space within the inner red ring on the legal stamp was impressed, in red ink, the figure of a crown. When the prisoner used these stamps, he cut out the circular space bearing the words "*Jones, Bristol,*" and pasted on the packets of medicine the two ends of the label without the middle part, and concealed the deficiency of that part by a waxen seal extending over it. Stamps in this state were uttered by the prisoner, affixed to the bottles and boxes of medicines which he sold to *Wood and Cunningham.* It was proved by Mr. *Linley*, the Supervisor of Stamps in the Stamp-Office, from the parts which remained, that these stamps never had been genuine stamps, but that the alterations had been so well made, that they might be im-

1812.

COLLICOTT'S CASE.

posed upon a common observer for legal stamps, and that he himself, if he had gone without suspicion to purchase any of the packets of medicines to which they were affixed, should have bought them without scruple, for that those parts which met the eye, were so like the same parts in genuine stamps, that it required critical inspection to discern the difference.

THE Jury found the prisoner guilty, but no sentence was passed.

THE COUNSEL *for the prisoner* moved two objections in arrest of judgment. FIRST, That the forged stamp was not a sufficiently near resemblance of the genuine stamp to constitute forgery. SECONDLY, That the indictment did not set out or describe what the stamp was that was forged, and that it was, for that reason, deficient in law and bad.

THE case was therefore saved for the consideration of the Judges, and the above objection was argued in the Exchequer Chamber on 25th April, 1812, before ten Judges, MR. JUSTICE LAWRANCE and MR. JUSTICE BAYLEY being absent, by CURWOOD for the prisoner, and by GURNEY for the Crown.

BUT before this argument took place, a doubt arose, whether, in this case, the offence was properly laid to be in LONDON, the prisoner's house being in MIDDLESEX, where he had delivered the goods to his porter to be carried to the inn in LONDON in order to be sent by a carrier to *Wood and Cunningham* at *Bath*; and there being a difference of opinion among the Judges, although a majority held the offence complete in *London*, no sentence having been passed, the prisoner was tried again at the Old Bailey in February Session, 1812, by a *London* Jury, for vending these sort of stamps affixed to boxes of Dr. Jebb's Pills, to one *Elizabeth Carver*, who kept a medicine shop under the *Royal Exchange*, in *London*; the facts and circumstances of which, as to the stamps, were precisely like those of the present case.

See the statute 53 Geo. III. c. 108. that all offences against Stamp Duties may be tried where committed or offender apprehended.

CURWOOD, *for the prisoner*.—The statute 44 Geo. III. c. 98. directs the Commissioners to use a stamp denoting the amount of the duty to be paid on those articles to which such stamp is to be applied. The words "*Duty three-pence*,"

1812.

COLLICOTT'S CASE.

therefore, are an essential part of the stamp; and to make this an offence against the injunctions of the statute, the offender must imitate all the essential parts of the genuine stamp, so as to give it such a similitude as is likely to deceive. But no evidence was given at the trial of what the centre of the forged stamp, then produced, originally contained, and therefore the Jury had no opportunity of considering whether there was or was not such a resemblance as would justify them in saying it was an imitation of the genuine stamp. It is certainly not necessary that the counterfeit should be a perfect similitude of the genuine stamp, but it is necessary that it should have such a general resemblance as to be capable of deceiving an ordinary observer. If the difference between the two sorts of stamps be conspicuously clear and evident, it is no forgery, as in the case of *Rex* v. *Jones* (1), who was indicted for forging *a bank-note*, but it appeared from the tenor of the instrument set out in the indictment, that it was what is called a *Fleet note:* it was a note promising to pay *John Wilson*, or bearer, TEN POUNDS: "For Self and Company of MY Bank in England," but without any signature; and it was determined that the indictment which charged the prisoner with having knowingly uttered a forged *bank-note* could not be supported, although, from its general appearance in some parts of it, it so much resembled a genuine Bank of England note, that it might, upon an unsuspecting view, deceive a common casual observer. An indictment charging a prisoner with having counterfeited a coin to the likeness and similitude of a *half-crown piece*, could not be supported by the production of a coin like a *three-shilling piece;* and the difference between these two stamps seems to be equally great. SECONDLY, The indictment ought to have set out an accurate description of the very stamp which is charged to have been counterfeited, or a *fac-simile* of it, as is the common and necessary practice in all indictments for the forgery of bank-notes; and if this had been done, that part of the genuine stamp which in the forged stamp was cut out, would then have been visible, and the difference between them would then have been apparent, by

(1) *Ante*, page 204. Case 103.

1812.

COLLICOTT'S CASE.

which the variance between the averment and the proof would have been clear, or the indictment would have appeared bad on the face of it.

GURNEY, *for the Crown.*—The present case is the first that has occurred on this statute, and of course the pleader had no precise precedent to follow in drawing the indictment; but it seems analogous to the case of *Rex* v. *Fuller* (1), where I argued for the prisoner that it was necessary, in an indictment for endeavouring to seduce soldiers from their allegiance, contrary to the provisions of the statute 39 Geo. III., to shew *the means* by which the prisoner endeavoured to seduce them; but the Court held it unnecessary. The statute 41 Geo. III. c. 39. to increase the difficulty and prevent the future forging of bank-notes, renders "the making or having in possession, without authority, any instrument for making paper of the sort therein described with curved bar lines, or the sums appearing in the substance of the paper, or producing the numerical sum of any bank-note to appear visible in the substance of the paper, a felony:" this statute, therefore, was intended to comprehend the case where a prisoner was intending to make and utter an incomplete thing to be finished afterwards by some other person; but in the present case the prisoner has himself gone through the whole process, and has uttered these forged stamps as complete genuine stamps.

(1) 1 Bos. & Pull. 180. *Ante*, page 790. Case 301.

CURWOOD, *in reply.*—The stamp which is charged to have been forged, was, in its original make, very obviously different from the genuine stamp; and although the prisoner vended it as and for a genuine stamp, that will not make it a nearer resemblance to the genuine stamp than it really and in fact was; for that was one of the points in *Rex* v. *Jones*, where the special verdict found that on uttering the instrument he averred it to be a good bank-note, and that he disposed of it and put it away as a good bank-note; but the Court said that this representation could not alter the purport of the instrument, or change what it appeared to be upon the face of it to a different thing.

LORD ELLENBOROUGH, *Chief Justice.*—The anterior state

1812.

COLLICOTT'S CASE.

of this forged stamp can make no difference. If the part of difference is extinguished it is the same as if it had never existed. Suppose a man were to counterfeit a coin with the name and head of a foreign prince upon it, and then efface it, so that it would look like a defaced English coin, would not that be a forgery? In the case of *Rex* v. *Jones* there was not the similitude to deceive: it did not on the face of the bill purport to be what he said it was.

MANSFIELD, *Chief Justice.*—*Jones*'s crime was that of telling a falsehood.

MR. JUSTICE GROSE, in May Session 1812, delivered the opinion of the Judges to the following effect.—The prisoner was tried and convicted in January and in February Sessions last, for two several offences in vending counterfeit stamps, at different times, to two several persons, contrary to the provisions of the statute 44 Geo. III. c. 98.; and both cases were saved for the consideration of the Judges on the same objections; the facts and circumstances of each case being, with respect to the subject of these objections, precisely the same. The first objection is, that the counterfeited stamp does not bear a sufficient resemblance to the genuine stamp to constitute the crime of forgery. SECONDLY, That the indictment is defective, in not having properly set out what the stamp was that is therein charged to be forged. As to the first point, it was proved that this stamp had, in every respect, and in all its parts, a perfect resemblance to a genuine stamp, excepting only that the centre part in a genuine stamp, which specifies and denotes the duty, was, in the forged stamp, cut out, and a paper with the words "*Jones, Bristol,*" on it, pasted over the vacancy. It was also proved that those parts which still remained were a perfect resemblance of the same parts on the genuine stamp, and that the whole was a fabrication so artfully contrived as to be likely to deceive the eye of every common observer (*a*). An exact resemblance, or *fac-simile*,

(*a*) On the statute 25 Edward III. for counterfeiting the Great Seal, it has been determined that splitting the seal, and closing it again to a false patent, is a counterfeiting, 1 Hale, 178. 184.; and that where the seal is

1812.

COLLICOTT'S CASE.

is not required to constitute the crime of forgery, for if there be a sufficient resemblance to shew that a false making was intended, and that the false stamp is so made as to have an aptitude to deceive, that is sufficient. In this case the Jury, by their verdict, have found that this stamp had a sufficient likeness to give it an aptitude to deceive, which is all the law requires. As to the second point, the indictment charges the prisoner with having forged a certain *mark*, and with having uttered a certain paper with a forged and counterfeited *mark*, resembling a mark provided and used in pursuance of the Act; and the other counts describe it to be *a stamp*. The statute makes the forging and uttering of such *a mark* or *stamp*, as is thereby directed to be affixed to these articles, a capital offence. The indictment contains all the words that the Act requires to constitute the offence. The Judges, therefore, are of opinion that these objections are of no validity; that the indictment is good in its present form; that the offence has been legally proved; and that the conviction is right.

substantially counterfeited, the adding or omitting of a crown; the leaving out words in the style or adding others; or making any other minute variation in the counterfeit, which is often done purposely and by way of eluding the law, will not alter the case, as was ruled in *Robinson's* Case, 2 Roll's Rep. 50. upon an indictment under the statute 1 Mary, c. 6. for counterfeiting the Privy Signet. The disparity, however, may be so great between the true and false seal that it would not amount to a counterfeiting within the statute, as if it be evident to the view of every man's eye.—1 East's P. C. 86.

CASE CCCL.

THE KING *against* BENJAMIN WALSH.

If a stock-broker receive *bank-notes* for the check of his principal, and be directed to invest their whole amount in *Exchequer Bills*, but instead of so doing, only applies part to that purpose, and runs away fraudulently with the remainder, he cannot be indicted for stealing *the check*, for that was delivered to and applied by him as the drawer of it intended; nor *the bank-notes*, for they were never in *the possession* of the prosecutor.' 4 Taunton, 258.

AT the Old Bailey January Session, 1812, *Benjamin Walsh* was tried on the statute 2 Geo. II. c. 25. before MACDONALD, *Chief Baron*, for stealing, on the 5th day of December, 1811, twenty-two *bank-notes*, the property of *Sir Thomas Plomer, Knt.*

1812.

WALSH'S CASE.

THE INDICTMENT contained seven counts. THE FIRST COUNT charged, that he, *Benjamin Walsh*, did feloniously steal, on the 5th of December, in the fifty-second year, &c. at *St. Dunstan's in the West*, twenty-two bank-notes, each being made for the payment of a thousand pounds, value a thousand pounds, and one other bank-note for payment of two hundred pounds, value two hundred pounds, the said several bank-notes being *the property* of *Sir Thomas Plomer, Knt.* and the money payable and secured thereon then being due and unsatisfied to the said *Sir Thomas Plomer, Knt.* the proprietor thereof, against the statute, &c. THE SECOND COUNT was for feloniously stealing *a Bill of Exchange*, made for payment of twenty-two thousand and two hundred pounds, value twenty-two thousand and two hundred pounds, *the property of* the said *Sir Thomas Plomer*, the *proprietor* thereof, and the sum of money for payment whereof the said Bill of Exchange was made being *due* to the said *Sir Thomas Plomer*, the proprietor thereof. THE THIRD COUNT was the same as the second, only omitting the words "to the said *Sir Thomas Plomer*, the proprietor thereof." THE FOURTH and FIFTH COUNTS were the same as the second and third, only calling the instrument stolen *a warrant for payment of money*, instead of *a Bill of Exchange*. THE SIXTH and SEVENTH COUNTS were the same as the fourth and fifth, only stating, in the sixth count, that the money *secured* by the said last-mentioned *warrant* for payment of money was then unsatisfied to the said *Sir Thomas Plomer*, the proprietor thereof; and, in the seventh count, that it was then unsatisfied, without stating to whom.

THE EVIDENCE.—The prosecutor, *Sir Thomas Plomer, Knt.*, having, in the month of July 1811, entered into an agreement for the purchase of a considerable estate in the county of *Middlesex*, soon afterwards consulted the prisoner, a stock-broker of great eminence, whom he had long been in the habit of employing in that capacity, and of whose integrity he entertained the highest opinion, respecting the most advantageous time to sell out stock, by way of being prepared with the purchase-money, telling the prisoner, that

1812.

WALSH'S CASE.

he imagined it would be wanted on, or perhaps before, the ensuing Michaelmas day, as the title would at that time be completed. At this period the price of stock was very low, and the prisoner advised him to delay the sale as long as possible, as, he thought, there was a great probability that the funds would gradually recover from the depression under which they were then labouring. The prosecutor adopted this recommendation, and requested the prisoner to apprize him from time to time of the variations that might occur in the state of the market. The title to the estate was not completed at the time expected; but in the month of October, the prosecutor, having then reason to believe that the deeds would certainly be ready on or before the ensuing Christmas Day, again applied to the prisoner, and after apprizing him of that circumstance, and telling him that, of course, he should have no immediate occasion for the money, consulted with him as to the expediency of disposing of his stock then, or letting it remain until the money should be wanted; but the prisoner repeated his advice not to sell, assigning as a reason, that, although the funds had materially risen, it was probable that the purchases that must be made in the ensuing month by the Commissioners for liquidating the National Debt, would have the effect of causing a still greater rise. It seems that the prisoner had, soon after this period, made large speculations in the funds (1), and finding that many other persons had purchased largely on the same idea of success, his mind became fearful that the price of them had been run up so high that there was a danger of a fall, which notion he, on 25th November, communicated to the prosecutor, apprizing him at the same time, that the transfer books at the Bank would shut on the 3d December. This, it appeared, was done with a view that the sale might, if the prosecutor chose, be previously made. Very soon after this information was given, the prisoner was extremely assiduous in calling on the prosecutor, and urging him, in the strongest terms, to dispose of his stock immediately, writing him several letters on the subject, and calling personally at his chambers in Lincoln's Inn, to repeat his advice, and stating as a

(1) See Aubert v. Walsh, 3 Taunt. 277. Busk v. Walsh, 4 Taunt. 290.

1812.

WALSH'S CASE.

reason for this extraordinary importunity, that from the great scarcity of money at that moment in the market, the 3 per cents. would, in all probability, sink from their then price, 62 or 63, as low as 50 per cent. This also was the concurrent opinion of a commercial gentleman, whom the prosecutor consulted on the subject. In consequence of these opinions and persuasions, the prosecutor, on Thursday, 28th November 1811, gave the prisoner a discretionary power to sell out 13,000*l.* 4 per cents. and 18,600*l.* 3 per cents. reduced, the whole of which, as the funds had rather fallen in price, he, on the opening of the market on the ensuing morning, contracted for the sale of for the sum of 21,700*l.*; and he asked the prosecutor, who had gone into the city that morning, with intention to finish the business, if it would be convenient to him to complete the transfer on the Wednesday or Thursday following, as it would be necessary to give previous notice to the purchaser, that he might be ready with the money, and which, when received, he strongly advised the prosecutor to invest in Exchequer Bills. No precise day for the transfer had been fixed by the contracting parties, and the prosecutor appointed Wednesday, the 4th December, for that purpose: on which day he attended and transferred the stock, and expressly ordered the prisoner immediately to invest the proceeds of the sale in Exchequer Bills, and lodge them, on his account, at his bankers, *Goslings and Sharp*, in *Fleet-street*. The prisoner, however, told him, that it was then too late to procure Exchequer Bills to such an amount, and the prosecutor, believing this assertion to be true, which it clearly was not, left the prisoner to receive the 21,700*l.* of the purchaser, with a desire that he would pay it into his banker's on the same day. This the prisoner promised to do, saying that he would call on the prosecutor the next morning, and get his check for such sum as he might choose to have laid out in Exchequer Bills. The prisoner received the 21,700*l.* accordingly, and paid it into his own bankers', *Robarts and Co.* On the same day he paid into *Goslings and Sharp* his own check on *Robarts and Co.* for 21,500*l.* on the prosecutor's account. On the following morning, Thursday, 5th December, soon

1812.

WALSH'S CASE.

after eleven o'clock, the prisoner called on the prosecutor, and received from him THE CHECK in question on *Goslings and Sharp* for 22,200*l.* The prosecutor directed the prisoner to go to *Goslings* and get the money for it, telling him that it was for the precise and express purpose, and for no other purpose whatever, of laying it out in Exchequer Bills, which the prisoner positively promised he would do, and either pay the Bills into *Goslings and Sharp*, or bring them to the prosecutor by four o'clock on the same day; but nothing was said as to what was to be done with *the money*, if Exchequer Bills could not be purchased. The prisoner received the 22,200*l.* at *Goslings and Sharp*'s for THE CHECK, in twenty-two bank-notes of *one thousand pounds* each, and one bank-note of *two hundred pounds*, and on the same day, with part of that money, he purchased 6,500*l.* Exchequer Bills, which he lodged at *Goslings and Sharp*'s for the prosecutor's account, and received a receipt for them. About half past four o'clock on the same day, he called on the prosecutor and produced the receipt, telling him that he had paid into *Goslings and Sharp*'s the Exchequer Bills, and the remainder of the money, delivering at the same time an account to the prosecutor, which purported to shew that he had contracted with *Coutts and Co.* for Exchequer Bills to the amount of 15,000*l.* but that *Trotter*, a partner in *Coutts*'s bank, who was then absent from *London*, had them locked up in a drawer under his own key, and would not return to deliver them until the following Saturday, the 7th December, on which day, he said, he would call again at three o'clock, for the prosecutor's check for that amount, and lodge the Exchequer Bills so contracted for at *Goslings and Sharp*'s on his account. The prosecutor did not examine the papers so delivered until this interview had ended, and the prisoner was gone away, when, on looking at them, he was surprised to find that there was a receipt only for the Exchequer Bills, but no receipt for the residue of the money. This circumstance created a suspicion that all was not right, and induced an immediate inquiry; upon which it was, in a short time, discovered that the prisoner had, in the afternoon of that very day, set out for

1812.

WALSH'S CASE.

Falmouth in the mail-coach, in which he had previously secured a place in a fictitious name, leaving with his clerk a note, addressed to the prosecutor, purporting to bear date on Saturday the 7th of December, and stating that the business respecting *Coutts'* Exchequer Bills, could not be finished until the following Monday; which note he desired might be delivered on the Saturday; a measure by which he hoped to gain more time in effecting his escape. It appeared that the prisoner was at this period labouring under pecuniary embarrassments of so distressing a kind, that he had for some time before meditated an emigration to *America*, and that, the better to effect this purpose, he intended to convert to his own use a large sum of money which he expected to receive about this time from a Mr. *Oldham*, for the purpose of investing it in the funds, but that on the 3d December *Oldham* only gave him 1,500*l.*, which sum being inadequate to the accomplishment of his scheme, he applied it to its destined use in the purchasing stock, according to the directions of its owner. It also appeared, that previous to the 29th November, 1811, he applied to *William De Berdt*, an American broker, to procure him American stock, to the amount of 11,000*l.*, of such sort as would be most useful to a person intending to reside in *America*; and 11,000*l.* America 3 per cents. or bank shares, amounting to 10,018*l.* 10*s.* 6*d.* was bought for him accordingly; and for which, on the 5th December 1811, he paid the broker eleven of the very bank-notes of 1000*l.* each which he had received for the prosecutor's check, receiving the difference from the broker; that he also paid for 1,500*l.* India Bonds with others of those notes; that he paid another of the said 1000*l.* notes in discharge of a debt which he had long owed to a gentleman in *The Temple*; that he had paid another of the said notes to a person on account of a near relation; that he gave another of the 1000*l.* notes to his clerk, to get changed for smaller notes at the Bank; and that on the same day he paid to Mr. *Fearne*, a dealer in foreign coin, 300*l.* for *Portugal* pieces, called doubloons, which he had contracted for only three days before, and which were delivered to him in a bag that was produced and identified at the trial.

1812.

WALSH'S CASE.

It also appeared that he left his country-house at *Hackney* early on the same morning in one of the *Hackney stages*; that he brought with him a travelling portmantua of linen, and a drab great coat, which he had contrived to pack up without the knowledge of his family; that he had provided himself with a dozen pair of boot stockings, several night-caps, and two pair of gloves, at a hosier's, in *Threadneedle-street*, to whom he said that he was going out of town for a few days; and that after having taken possession of the foreign coin, and the American securities, he absconded as before described. The route, however, which the prisoner had taken being discovered, he was immediately pursued and apprehended on Monday morning, 9th December, at *Falmouth*, just as he was about to get on board the packet for *Lisbon*, to which place he acknowledged he intended to go, and afterwards to take such opportunity as might offer to get to *America*. On being told the charge that was made against him, he delivered up the 11,000*l.* America bank shares, and the bag of Portugal pieces, and was afterwards conveyed to *London*, and carried to the Public Office in *Bow-street*.

THE Jury found the prisoner guilty; AND ALSO THAT he received THE CHECK of 22,200*l.* from *Sir T. Plomer* with a *fraudulent design* of appropriating a part of its proceeds to his own use.

BUT the case was reserved for the consideration of THE TWELVE JUDGES, whether, under this finding, and the circumstances of the case, the offence amounted to felony.—It was admitted that *the bank-notes*, which the indictment charged the prisoner with having stolen, were the *bank-notes* paid to him by *Goslings and Sharp*, in discharge of the prosecutor's check on them payable to him for 22,200*l.* and that the *Bill of Exchange*, and *the warrant for the payment of money*, also charged in the other counts of the indictment, were intended to be a description of THAT CHECK.

THE case was argued in the Exchequer Chamber on the 1st, and at Serjeants' Inn on the 14th of February 1812, before eleven Judges, LAWRANCE, *Justice*, being absent, by SCARLETT for the prisoner, and by GURNEY for the Crown.

1812.

WALSH'S CASE.

SCARLETT, *for the prisoner*, contended, that the counts in the indictment, which laid this CHECK to be a *Bill of Exchange*, and a *warrant for the payment of money* (1), were bad; for that the statute 2 Geo. II. c. 25. s. 3. extends only to such instruments as are available securities, in the hands of the party from whom they are stolen (*a*); that a check on a banker does not create any *debt* between the drawer and the banker, whose liability to the drawer remains precisely the same as before, and is not altered in any respect by such an instrument; and that, consequently, the check in the present case, not being a security to the prosecutor, cannot be averred, as in this indictment, to be either "a Bill of Exchange," or "a warrant for the payment of money," the *property* of the prosecutor, and upon which the sum of money, for the payment whereof it was made, was *due thereon* to him (*b*); and he cited the case of *Rex* v. *Phipoe* (2), where it was decided that a promissory note, in the hands of the drawer, was not within the statute. But admitting this check to be a *chose in action* within the statute, it was not *stolen* by the prisoner from the prosecutor, for the prosecutor gave it to him for the purpose of his receiving the money for it at the banker's, and of purchasing Exchequer Bills with it to the amount. The money was received for it at the banker's, and

(1) See Willoughby's Case, 2 East, 581.

(2) *Ante*, page 673. Case 283.

(*a*) The words of the statute are, as to this point, "That if any person shall steal any bank-note, goldsmith's note for the payment of money, or any warrant, bill or promissory notes for the payment of any money, being *the property* of any other person, notwithstanding any of the said particulars are termed in law a *chose in action*, shall be deemed guilty of felony of the same nature and in the same degree, &c. as it would have been if the offender had stolen any other goods of like value with the money due on such note, warrant, or bill, or *secured thereby* and *remaining unsatisfied*; and such offender shall suffer such punishment as he should or might have done if he had stolen other goods of the like value with the monies due on such note, warrant, bill, &c. respectively, or secured thereby and remaining unsatisfied.

(*b*) In Mr. *Christian*'s notes to Blackstone's Commentaries, it is said that LORD ELLENBOROUGH, at Carlisle, 1802, held that it is not felony under the statute 2 Geo. II. c. 25. to steal bankers' notes, which were completely executed, *but which had never been put in circulation*, because no money was due upon them. 4 Com. 234.

1812.

WALSH'S CASE.

with part of its proceeds Exchequer Bills were purchased and lodged with the same banker. How then can he be charged with having stolen the whole proceeds of the draft? But THE PRINCIPAL QUESTION in this case will turn upon the first count, on which three points may be made. FIRST, Whether there was a fraudulent taking of these bank-notes. SECONDLY, Whether the notes were the property of the prosecutor. THIRDLY, Whether it was done without the consent of the prosecutor:—As to the third point, it is agreed that there must be *fraudulenta contractatio rei alienæ animo fu-randi invito domino* (1). In *The Carrier's Case* (2), and in *The Miller's Case* (3), the respective owners had transferred *the possession* only of the property for a special purpose, they always looking to the goods being restored, and therefore, as *the property*, in those cases, still remained in the owners, a conversion of any part of it is properly taken to be *against his consent*; but in the present case, the prosecutor parted both with the *possession* and the *property*, if he ever had any property in the notes, to the prisoner, without reserving to himself any expectancy of a return *in specie* of any portion of them. The statutes of 21 Hen. VIII. c. 7. as to property delivered to servants by their masters, and the 3 & 4 Will. & Mary, c. 9. s. 5. as to furnished lodgings let to tenants, shew that a party who has received, under a contract, a special use in a property delivered into his own possession, could not, at Common Law, be guilty of larceny by any conversion of that property to his own use, though the owner had retained the *ultimum jus proprietatis:* but where the owner has spontaneously parted with the *ultimum jus proprietatis*, it is clear that the thing so parted with cannot be the subject of larceny by the person receiving it; and he referred to the cases cited in the margin (4). The distinction, therefore, appears to be, that where a person receives, with the consent of the owner, only *the possession* of property, his subsequent act may, under circumstances, be felony; but that where he acquires the *right of property* with consent of the owner, no subsequent applica-

(1) 3 Inst. 107. 1 Hale, 504. Bract. lib. iii. c. 32. Glanvil, lib. vii. c. 17.—lib. x. c. 15. Mirrour, cap. 1. s. 10.

(2) 1 Hale, 504.

(3) 1 Roll. Abr. 73. pl. 16.

(4) Rex v. Nicholson, *ante*, page 610. Case 268. Rex v. Parkes, *ante*, page 614. Case 269. Rex v. Cath. Coleman, *ante*, page 303. 2 East, *notis*, 672. Rex v. Anne Atkinson, *ante*, page 302, *notis*. See also the Case of J. W. Atkinson, 2 East, 673.

tion of it by him can constitute *a felony*, though his manner of acquiring it may, if other circumstances concur, be *fraudulent* within 33 Hen. VIII. c. 1. of false tokens, or the 30 Geo. II. c. 24. respecting false pretences. To apply these observations on the law to the facts of the present case.—The prisoner undertook to perform a business which was in the regular course of his employment, for which he was to be allowed a commission, and he received this money for the purpose of enabling him to perform that contract. This created a debt, and nothing but a debt, between him and the prosecutor. Supposing for the moment that these notes had ever been in the possession, as the property, of the prosecutor, it was no part of the contract that he should receive either the whole or any part of them back: he had no such expectation; but he expected to receive a different species of property in lieu of them, namely, Exchequer Bills. If he had brought an action for money had and received, a tender of equivalent property would have been an answer to the action, which shews that he was not intitled to recover the identical notes; and if he had brought an action of trover to recover them identically, no conversion could, under the circumstances of this case, be proved; and if there be no conversion there can be no felony. But in truth *the property* of these identical notes never was vested in the prosecutor, or could in any way become his property (*a*). They were received in payment of the check, and it was not in the contemplation of either of the parties, that *they* were to be brought back by the prisoner to the prosecutor. This case, therefore, is in no shape analogous to the case of a master sending his servant with a check to his banker's for

(*a*) MANSFIELD, *Chief Justice*, observed that the question whether these notes were the property of the prosecutor, would beget nice questions under certain circumstances, as if the prisoner had dropped down dead with the notes in his pocket, a Court of Equity would have restrained his executor from parting with them; or if, after the prisoner had got the notes, the prosecutor had countermanded the authority, whether a Court of Equity would not have compelled the prisoner to give them up. It is laying down the proposition too widely to say that they could be in no case the property of the prosecutor.

1812.

WALSH'S CASE.

money, for there the return with the money is implied from the nature of the employment, there being no intervening agreement or consideration to prevent it. Suppose the prisoner had paid the check itself into his own banker's, and had received notes to its amount from them, could the notes so received by him have been considered as property taken from the possession of the prosecutor without his consent? He never was either in the actual or the constructive *possession* of them, and therefore they could not be feloniously taken from him, as was determined recently in *Rex* v. *Bazeley* (1), and also by the Case in *Hale* (2), who says, if A. the servant of B. receive the rents of B., and *animo furandi* carry them away, it is no felony at Common Law, because A. had it by delivery, nor by the statute of 21 Hen. VIII. c. 7., because he had it not from his master or his mistress. But the prisoner was not *the servant* of the prosecutor, and as his case is not within the 39 Geo. III. c. 85. it is not felony. The Jury, it is true, have found that he received this draft with a *fraudulent design* to appropriate part of its proceeds to his own use, but obtaining property *fraudulently* is not obtaining it *feloniously* (3), as the common cases of obtaining goods by false tokens or by false pretences clearly shew. To constitute felony there must be *a trespass*, as in *Farr's Case* (*a*), and

(1) *Ante*, page 835. Case 311.

(2) 1 Hale, 505, cited from Dalton, c. 102.

(3) See Wilkins's Case, *ante*, page 520. Case 236.

(*a*) East, 660. Kely. 44. The case was thus:—The prisoners, *Richard Farr* and *Eleanor Chadwicke*, intending to rifle the house in which a Mrs. *Stanyer* lived apart from her husband, went to an attorney, and pretending that Mrs. *Stanyer* was *Farr's* tenant and in arrear for rent, obtained possession of the house by means of a fraudulent ejectment, and at the same time arrested Mrs. *Stanyer* under a writ of *latitat*, and caused her to be carried to prison; and then the prisoners rifled the house and took away the goods and hid some, and altered the marks upon the others, and sold the rest; and being questioned concerning these acts, and asked what colour of title they had to the house or the goods, they could pretend none. It appeared, indeed, that the real landlord had received the rent of it for many years, and that no rent was in arrear; neither could they pretend to any cause of action against Mrs. *Stanyer*. The Jury were directed, that if they believed the prisoners had done all this with an intent to rob, they ought to find them guilty, which was accordingly done, and they were both executed.

1812.

WALSH'S CASE.

Le Motte's Case (1). Some act of circumvention, fraud, or treachery must be used, not merely in the subsequent appropriation, but in the original means by which the possession of the property is obtained; but here the prisoner does no tortious act to obtain the possession either of the check or the notes; for his advice not to sell the stock was good advice, and the propriety of it was confirmed by a commercial gentleman whom the prisoner himself consulted on the subject. The prisoner did not officiously introduce himself as an agent to the prosecutor, nor allege any thing false, as *Aickles* did, in his case, to Mr. *Edwards* (2), but he was voluntarily consulted by the prosecutor himself in every stage of the transaction. It would, indeed, have been a case of a very different complexion, if he had knowingly given any false representation of the state of the market; but his advice in every instance was warranted by the circumstances.

(1) Kely. 42. East, 485.

(2) *Ante*, page 294. Case 146.

GURNEY, *for the Crown*, contended that the prisoner's conduct throughout the whole, and in every part of this transaction clearly manifested a fraudulent and premeditated design; that it had been so found by the Jury; and that this finding satisfied the definition given of larceny by *Bracton* and other writers, *viz.*; that it consists (3) in the fraudulent taking of the property of another with an intention to steal it against the will of the owner; that the original taking in the present case was clearly fraudulent, and under a premeditated design to convert it, *lucri causâ* (4), to the prisoner's use against the will of the owner; for that if the purpose then lurking in his mind had been known to the prosecutor, he never would have parted with the property; his solemn declaration on the trial was to this effect. It is said however that the check which the prisoner obtained, is not within the statute 2 Geo. II. c. 25. because it was not an available security while it remained in the hands of the drawer, and the case of *Rex* v. *Phipoe* (5), was cited to prove it; but the circumstances of that case do not support the proposition, for there the very paper, the writing, the pen, and the ink, on, and by which the note was made, were the indisputable property of the prisoner, and never was in any way the property, or

(3) Bracton's Definition, Bk. iii. c. 32. f. 150. *Contractatio rei fraudulenter, cum animo furandi invito illo domino cujus res illa fuerit.*

(4) The taking must be *animo furandi*, or, as the Civil Law expresses it, *lucri causâ*. 4 Bl. Com. 232.

(5) *Ante*, page 675. Case 283.

1812.

WALSH'S CASE.

in the peaceable possession of *Curtois*, who was compelled by duress to sign it with menaces of immediate death. Suppose the prosecutor had accompanied the prisoner to the bankers, and desired the cashier to let him have £22,200 in notes on his the prosecutor's account, the notes under such circumstances would certainly have been the property of the prosecutor; and the delivery of them to the prisoner by written or by oral order cannot make any difference: nor is it material that these notes were received by the prisoner as a Stock Broker in the course of his business. In the case of *Rex* v. *Nicholson* (1) and others, which was for stealing money by means of the old device of "Hiding under the Hat," the prosecutor *Cartwright* admitted that he intended to gamble; that having won the first wager, he should, if the transaction had ended there, have kept his winnings; that he did not object to the prisoner taking the money when he lost; and that if the prisoner had lost he expected to receive from him the amount of the stake; so that he had voluntarily parted not only with *the possession*, but with *the property* also, and gave up all controul over it in every shape: the cases of *Rex* v. *Cath. Coleman* (2), and *Rex* v. *William Atkinson* (*a*), are also very different in principle from the present, for they were both clearly cases of fraud, and not of felony. There the property was clearly and indisputably parted with. BUT IT IS CON-

(1) Rex *v.* Nicholson, Jones and Chapel, *ante*, page 610. Case 268.

(2) *Ante*, page 303, *notis*.

(*a*) The indictment in this case was for stealing bank-notes, the property of William Dunn. The prisoner sent one Dale, a stranger, with a letter directed to Dunn, bidding Dale to tell Dunn, that he brought the letter from a Mr. Broad, and to bring the answer to him, the prisoner, in the next street where he would wait for him. Dale accordingly carried the letter to Dunn, which was written in the name of Broad, a friend of Dunn's, soliciting the loan of 3*l*. for a few days; and desiring that the money might be inclosed back in the letter immediately. Dunn thereupon sent the bank-notes in question inclosed in a letter directed to Broad, and delivered it to Dale, who delivered them to the prisoner as he was first ordered. The letter turned out to be an imposition. It was objected that this was no felony, because *the absolute dominion of the property was parted with by the owners*, though induced thereto by means of a false and fraudulent pretence: and THE JUDGES all held it was no felony, on the ground that *the property was intended to pass by the delivery of the owner*. 2 East, P. C. 673.

1812.

WALSH'S CASE.

TENDED, that as these notes never were in the actual possession of the prosecutor, they never were or could be his property: if however he had found the prisoner dying in the street with these notes in his pocket, or had been present when he was paying them away to *De Berdt*, for the American stock, he might have lawfully taken them from him. Property cannot exist without having a legal owner; the banker could not be the legal owner of these notes after he had paid them to the prisoner in discharge of the check; they were then no longer the banker's property; the prisoner could not be the legal owner or proprietor of them, for he received them for a special purpose; they must therefore be the property of the prosecutor in the possession of the prisoner; for there could not be any other proprietor of them. In the case of *Rex* v. *Wilkins* (1), it is clearly settled that the possession of personal chattels follows the right of property in them; that the possession of the servant is the possession of the master (2); that the master's possession cannot be devested by a tortious taking from the servant; and that these rules apply to all cases where servants have not the absolute dominion over the property, but were only intrusted with the care or custody of it, *for a particular purpose.*" It follows therefore from these principles, that the prisoner's possession was the possession of the prosecutor, and in all the cases in which it has been determined that the prosecutors had parted with the property as well as the possession, it uniformly appears that the original receipt was not felonious, according to the distinction in *Rex* v. *Charlewood* (3), that if the felonious intention existed at the time of the taking, the possession of the property still remains with the owner (4). The robbing of ready furnished lodgings, was, at Common Law, no felony, because the first possession of the prisoner was lawful; yet if it clearly appeared that he took the lodgings with intent to gain a better opportunity of rifling them, and to elude the law, it seems that it would be felony notwithstanding the delivery of the property to the prisoner's use (5). An owner does not part with the possession of his property by delivering it to another for a *special purpose*, as where a

(1) *Ante*, page 520. Case 236.

(2) Hudson *v.* Hudson, *ante*, page 522, cited.

(3) *Ante*, page 409. Case 189.

(4) Rex *v.* Raven, Kely. 24, 81. Rex *v.* Meers, 1 Show. 50. 2 East, 585.

(5) 1 Hawk. c. 33. s. 24. East, 585. Rex *v.* Munday, *ante*, page 850. Case 312.

1812.

WALSH'S CASE.

Silk Throwster (1) delivered silk to his servant to work it up in the house, but instead of so doing he converted it to his own use, and this was held to be felony (*a*); and *Hawkins* (2) mentions many other cases where a possession not of the owner, has been held to be his possession. In *the Carrier's Case*, certain packages were *delivered* to him to carry to *a particular place*, but instead of so doing, he took them to another place and broke them open and converted the contents to his own use, and it was resolved to be felony, because after he had obtained the delivery of them, his subsequent act of carrying them to another place, and there opening them and disposing of them to his own use, is a declaration that his intent originally was, not to take them upon the agreement of the party, but only with a design of stealing them (*b*). BUT IT IS SAID there can be no felony in the present case, because there was no intention on either side that the prosecutor should repossess this property; but a consignor who never intends to have the goods again, may, if they are stolen *in transitu*, lay them to be his property. The case of *Rex* v. *Wynne* (3) is stronger on this point; for there the hackney coachman had not even *a charge* of the goods: the prosecutor left them accidentally in his coach, and yet his subsequent conversion of them to his own use was determined to

(1) Kely. 35. See also 2 East, P. C. 683.

(2) 1 Hawk. c. 33. s. 19.

(3) *Ante*, page 413. Case 191.

(*a*) It is worthy of consideration whether the distinction concerning the *legal possession* remaining in the owner after a delivery in fact to another, do not extend to all cases where the thing so delivered for *a special purpose* is intended to remain in the presence of the owner; for in such case the owner cannot be said to give any credit, or to repose confidence in the party in whose hands it is so in fact placed; and the thing being intended to be returned to the owner again, and resumable by him every moment, his dominion over it is as perfect as before, and the person to whom it is so delivered has at most no more than a bare limited use or charge, and not the legal possession of it: in this respect the case differs from *a delivery upon contract* whereby a special property is transferred, and consequently a distinct possession. 2 East, 683.

(*b*) This case is said to be admitted to be law in all the cases where the question has been canvassed, 1 Hale, 504. 1 Hawk. c. 33. s. 5—7. 3 Inst. 107. Kely. 81, 82. 4 Black. Com. 230. But that it seems to stand more upon positive law than sound reasoning. 2 East, C. L. c. 16. s. 115.

1812.

WALSH'S CASE.

be felony (*a*). So in the case of *Cartwright* v. *Green* (1), where a bureau in which nine hundred guineas had been long concealed by its original owner, was sent, by the executor of such deceased owner, to one *Green*, to be repaired, who discovered its contents, and converted the guineas to his own use; and this was held to be felony, although these guineas had never been in *the possession* of the executor, for he was ignorant that they were there. All these cases in which the property has been obtained with *the consent of the owner* have been held felony, where it appeared that the delivery was made for one purpose, and the property fraudulently converted to another: and in the case of *Rex* v. *Chiffor* (2), where the prisoner went into the shop of the prosecutrix, and cheapened some cravats which were put into his hands to look at, the price being seven shillings; but instead of paying for them he ran away with them, and held felony; for the goods were not out of the owner's possession by *the delivery*, nor could be until the property was altered by the *perfection of the contract*. So in the ring-dropping cases, where the prosecutor parts with his money upon the expectation of receiving in return a jewel or money of greater value, or larger amount, as in *Rex* v. *Humphrey Moore* (3), *Rex* v. *John Watson* (4). And in the case of *Rex* v. *Patch* (5), which was also a ring-dropping case, where the prosecutor was induced to *deliver* his property upon the ring being put into his hands, which he was to receive as his own when the prisoner returned him his property and *seventy pounds*, the supposed half value of the ring, the Court was of opinion that as the possession was obtained by fraud, the property was not altered, for it was the intention of the prosecutor to have the value of his property again. So in *Rex* v. *Paradice* (6), where a cash keeper *received from his master* bills to the amount of £1500, with directions to inclose them in different covers and send them by that day's post to his correspondent in *London*, but instead of so doing he secreted them and converted one

(1) *Ante*, page 952. Case 334.

(2) T. Raym. 275. *Ante*, p. 526, cited. East, 677, 683.

(3) Rex v. H. Moore, *ante*, page 314. Case 152.

(4) 2 East, 680. *Ante*, page 523, cited.

(5) *Ante*, page 238, Case 119.

(6) *Ante*, page 523, cited.

(*a*) See also the case of Lambe, a hackney coachman, who was tried at the Old Bailey, and convicted of a similar offence. 2 East, 664. *Ante*, page 416, *notis*.

1812.

WALSH'S CASE.

of them to his own use, and it was holden *felony*, on the ground that the possession of these bills still continued in the master; though the jury in that case did not find that the prisoner obtained the possession of the bill with intent to steal it. So in *Rex* v. *Lavender* (1), who being a servant to one *Edwards*, had a sum of money *delivered to him by his master*, to carry to the house of, and leave it with one *Thomas Flawn*, but instead of so doing he converted it to his own use, and the question was, whether this was felony or breach of trust, and it was held to be felony, upon the principle that the possession still continued in the master; and the case of *Rex* v. *Will Watson* (2) was cited, where three pounds had been delivered to the prisoner by his master to buy some blank licences with, but instead of so doing he ran away with the money, and it was then held not to be felony, because to make it felony there must be some act done by the prisoner, a fraudulent obtaining of the possession with intent to steal; but the Judges held this case not to be law, for that he was guilty of larceny, though the money was delivered to him to *make purchases with on his master's account*. The next case of this sort is *Rex* v. *Chipchase* (3), where the prisoner was cashier to the prosecutors, and in the ordinary course of his business took the bill in question by *permission of his masters* to carry it to their bankers, where he received money for it, and absconded with it, and it was contended that this was only a breach of trust, the bill having come legally into his possession, by permission, for no specific purpose, but generally like all the other bills of his masters over which he had a disposing power; that he had a right to receive the money for the bill, though not to convert it, when received, to his own use; but HEATH Justice held it to be a clear felony. So in *Rex* v. *Sharpless* and *Greatorex* (4) who hired lodgings, and ordered in goods to look at from the shop of a neighbouring tradesman, and while the servant went back for other goods which they pretended they wanted to see, they made off with those which he had left behind, and it was held to be felony, for that by this delivery the property was not changed. So in *Rex* v. *Wilkins* (5), where a hosier's apprentice was carry-

(1) *Ante*, page 870, cited.

(2) 2 East, 562; and *ante*, page 870, *notis*.

(3) *Ante*, page 699. Case 287.

(4) *Ante*, page 92. Case 52.

(5) *Ante*, page 520. Case 236.

1812.

WALSH'S CASE.

ing stockings to the house of a customer, and the prisoner met him on the way, and induced the apprentice to deliver the parcel to him, under the false pretence that he was the customer who had purchased them, and this was holden to be felony, for that the possession of the servant was the possession of the master, and that the possession of the true owner cannot be divested by a fraudulent obtaining of the property. So in *Rex* v. *Noah Pierce* (1), who went to a country Post-Office, pretending to be a mail guard, and obtained from the Post-master the bags of letters, and it was held a capital offence within 7 Geo. III. c. 50. s. 2. for that his artifice in obtaining the delivery of them in a bag out of the house was the same as if he had actually taken them out himself, although the Post-master had no property in the mail bag to part with. But it is said that to constitute felony there must be a *trespass*. In *Rex* v. *Pear* (2), in the debate among the Judges, on the point, whether the mode of his obtaining the mare by hiring her of a stable-keeper on pretence of going to *Sutton*, would amount to a trespass, the text of *Littleton* was quoted: "If I lend my sheep to one to dung his land, or my oxen to plough the land, and he killeth my cattle, I may have *trespass* notwithstanding the lending;" and the prisoner was holden guilty of felony, for that as the delivery was by the owner for a *special purpose*, the property in the mare still remained with him: and the case of *Rex* v. *Charlewood* (3), and *Rex* v. *Major Semple* (4), are to the same effect. But as applicable to the present question, there still remains the very important case of *Rex* v. *Aickles* (5). The bill of exchange which he was charged with having stolen, was *delivered to him* by its owner, *Mr. Edwards*, for the *special purpose* of his getting it discounted; but being suspected, *Mr. Edwards* desired his clerk to follow him, and not to lose sight of him, but the prisoner eluded the vigilance of the clerk, and absconded with the bill. There were two questions: 1st, whether the prisoner had a preconcerted design to get the bill into his possession, with an intent to steal it; and 2dly, whether the prosecutor intended to part with the note to the prisoner without having the note or the value of it returned to him. The Jury found the affirmative of the

(1) 2 East, 603.

2 East, 673.

(2) 2 East, 685. *Ante*, page 212. Case 105.

(3) *Ante*, page 409. Case 189.

(4) *Ante*, page 420. Case 196.

(5) *Ante*, page 294. Case 146.

1812.

WALSH'S CASE.

first question, and the negative of the second, and concluded that the prisoner was guilty; and all the Judges were of opinion that the conviction was right, for they entertained no doubt but that the prosecutor retained the property of the bill: if the prisoner had taken it with an honest intent to get it discounted, and had not succeeded, he ought to have returned it to the prosecutor. There is however another case which is applicable to the present. At the Summer Assizes in *Northumberland*, in the year 1811, one *Oliver* was tried before MR. BARON WOOD, for larceny. The prisoner being in possession of a quantity of gold coin, went to a public-house in the neighbourhood of *Newcastle-upon-Tyne*, where he fell in company with the prosecutor, *William Smith*, who happened unfortunately to have about him at the time bank-notes to a considerable amount, the property of his master, *Sir James Hall:* the prisoner made a display of his gold to the company, and, after some conversation had passed between them, *Smith* expressed a wish that the prisoner would oblige him by letting him have some gold in exchange for notes and silver, and on the prisoner's agreeing to let him have the gold, not at an advanced price (*a*), but at its legal currency, an exchange of gold for notes and silver took place between them to a small amount: soon afterwards the prisoner observed to *Smith*, that if it would be of any material accommodation to him, he could procure him a further quantity of gold coin if he would lay down notes to the amount: upon which the prosecutor put down 35*l.* in bank-notes for the purpose of receiving back their amount in gold; the prisoner took up the notes and went out of the house with them, promising to return immediately with the gold; but instead

(*a*) Some time previous to this period, the current gold coin of the kingdom had become so scarce that those who had hoarded or could procure it were tempted to dispose of it at very exorbitant premiums, and the traffic at length reached such a height, that the Legislature was compelled by the statutes 51 Geo. III. c. 127. and the 52 Geo. III. c. 50. to make it a misdemeanor liable to very severe punishment "for any person to receive or pay for any of the gold coin lawfully current within the realm any more in value, benefit, profit, or advantage, than the true lawful value of such coin, whether such value, benefit, profit, or advantage was paid, made or taken in lawful money, or in bank-notes."

1812.

WALSH'S CASE.

of performing his promise, he went away with the property, and the prosecutor never saw him again, until he was apprehended, and the Court held that these facts clearly amounted to felony, if the Jury should be of opinion that the prisoner, when he took up the notes, had a design to steal them; this was the sole question; for that if the prisoner had, at the time, the *animus furandi*, all that had been said respecting *the property* having been parted with by this delivery was without foundation; that in truth there was nothing like a parting with the property at all; for that could only be done by a contract to that effect; that a contract required the assent of two minds; but that, in this case, there was no assent of the sort, either on the part of the prosecutor or of the prisoner: the prosecutor suffered the prisoner to take these notes upon the full faith and expectation that the prisoner would immediately bring him back gold to that amount in return; but the prisoner had no such idea: he never meant to *barter* but to *steal*; and wherever there is a felonious design, the property, notwithstanding the delivery, is still in the constructive possession of the true owner. In *Rex* v. *Munday* (1), the prosecutor had even entered into an agreement with the prisoner for the lease of a house for twenty-one years; of which he *gave him possession*, and he stripped it of all its lead; and it appearing that he had procured this agreement and this possession by a false address as to his residence, and a misrepresentation of his character and situation of life, with intent, not to enjoy the house, but to rob it of its fixtures, he was held guilty of felony on 4th Geo. II. c. 32. In the case of *Rex* v. *Campbell* (2), the prisoner was a lodger, and his landlady wanting change for a bank-note, sent it, by her servant, to the prisoner up stairs, begging that he would give her change for it; on examining his purse he said that he had not enough by him for the purpose, but that he would go to his banker and get her the money for it, but instead of so doing he ran away with it, and this was held to be larceny, though the prisoner had used no fraud or contrivance whatever to obtain the delivery of it, and though the prosecutrix never expected the note itself to be returned to her, or to see it again *in specie*. In *Rex* v. *Spears* (3), a cornfactor

(1) *Ante*, page 850. Case 312.

(2) *Ante*, page 564. Case 253.

(3) *Ante*, page 825. Case 307.

1812.

WALSH'S CASE.

sent the prisoner, who was his servant, with *his barge* to a corn-meter for as much corn as the barge would hold, and five quarters out of 225, which had been put on board the barge, were stolen out of it by the prisoner, and held felony, although they never had been otherwise in the possession of the prosecutor than being put on board his barge. The same point was also determined in *Rex* v. *Abrahat* (1). BUT IT IS SAID that it was no part of the contract with the prisoner that he should take this check to *Gosling*'s, but that he might have taken it to his own banker, and obtained the value of it there: but what difference could this have made? for it would still have been the prosecutor's property in his hands for a special use, and having been originally obtained with a fraudulent intent, the subsequent conversion of part of it is felony. But he did in fact go to the bankers with the check, in the regular course of the business, and which the prosecutor swore, on the trial, he expected he would do. It is also said that the reception of this money, created A DEBT, and nothing but a debt between him and the prosecutor, but to create a debt it is necessary that there should be a contract, which cannot be formed without the assent of two minds, both willing the same thing; and can it be supposed that a credit to the amount of £22,000 could be intended to be given to a man who had recently been bankrupt, and whose deranged circumstances at the time were well known. The prisoner was clearly *the agent* of the prosecutor, whose property the notes instantly became the moment they were handed over the counter in exchange for the check; the prisoner was a mere holder of them, for the special purpose of purchasing Exchequer Bills according to the directions of the owner. Suppose that at the moment the prisoner held the notes in his hand, some event had suddenly occurred to occasion the stoppage of the banking-house, would not these notes have been received by him to the use and as the property of the prosecutor. The bankers could not have retained them; but the prosecutor might have legally taken them from the prisoner, who had no right to detain them as against him. It is said however that in order to convert a voluntary delivery into a larceny, there must be fraud and contrivance,

(1) *Ante*, page 824. Case 806.

1812.

WALSH'S CASE.

as in the case of *Rex* v. *Pear* (1), and *Rex* v. *Major Semple* (2); and in what case has there ever been more fraud, more contrivance, than in the present case: the prosecutor did not put this property into the hands of the prisoner to merchandize with it at his own discretion, but he was bound to employ it according to the special direction he received from the prosecutor, and to no other purpose whatever: under these circumstances if he had even employed it for an honest purpose it would have been a conversion. It is asked where the *trespass* is in this case, for certain it is that where there is no trespass there can be no felony; but in this case the trespass is clear from the conversion which the prisoner made of part of the property to his own use.

(1) *Ante*, page 212. Case 105.

(2) *Ante*, page 420. Case 196.

To THE OBJECTION that this check, while in the hands of the drawer, was not an available security within 2 Geo. II. c. 25. it may be observed that in many cases the purview of a statute reaches beyond the apparent intent of it. The 2 Geo. II. c. 25. and the 32 Geo. II. c. 10. s. 34. were meant to give protection against forged wills, and yet the forging of the will of a person who is alive, with intent to defraud, is held to be within these Acts. Here the Jury have found that the prisoner obtained the money with a fraudulent intent to convert part of it to his own use, which is sufficient to shew his intent to defraud, and quite enough to satisfy the definition given of larceny by *the Fleta*, by *Bracton*, by *the Mirrour of Justices*, and by *Sir Edward Coke*, who use the words "fraudulent," "fraudulently," and "treacherously" in their definitions of this offence. The taking is here found to have been fraudulent, and the authorities make it clear, that when the property is applied to a different purpose from that for which it was delivered by the owner, it is taken *invito domino*. From these cases the general principles of the law upon this subject, have been well and correctly stated by MR. EAST, "first, that where, notwithstanding a delivery by the owner in fact, the legal possession remains exclusively in him, larceny may be committed exactly the same as if no such delivery had been made.—Secondly, that, where by the delivery, a

2 East, 682.

1812.

WALSH'S CASE.

2 East, 551. from MSS. CHAPPLE, *Justice.*

special property, and consequently a legal possession, apart from any felonious intent, would be transferred, there, if it be found that such delivery was fraudulently procured with a felonious intent to convert the property so acquired, the taking also amounts to larceny: and he adds, "though the possession be delivered by the owner for a particular purpose, yet if it be obtained by any fraud, it amounts to a *tortious taking*, in the same degree as if the party had taken it without any delivery from the owner; though otherwise if the delivery be obtained on A TRUST without a fraud.

SCARLETT *in reply.* The three points upon which I before contended that this case does not amount to larceny, I shall still endeavour to maintain, FIRST, that no fraud was practised by the prisoner in obtaining this property; SECONDLY, that the property of the bank-notes never was in the prosecutor; and THIRDLY, that, supposing he had the property, he parted with it both as to the notes and as to the draft on A TRUST, and never intended that either of *them* should be returned to him again. The circumstances upon which *fraud* has been imputed to the prisoner, as indicative of the *animus furandi*, are the purchase of the American stock; the secretly packing up linen and clothes for a journey; the taking a place in the *Falmouth* Mail in a fictitious name; and the purchasing and carrying away with him the foreign coin: but these were no part of any *fraud* practised on the prosecutor to induce him to part with the possession; for they are circumstances which were quite unknown to him at the time he gave the prisoner the check. The first money received by the prisoner was for the proceeds of the stock, which was regularly paid into the prosecutor's bankers. Up to this period, therefore, no fraud was practised nor any felony committed. On the ensuing day the prisoner received a check for £22,200, to be laid out in the purchase of Exchequer Bills, but it does not appear that the prisoner originally recommended the prosecutor to invest this money in these securities, or that he had practised any *fraudulenta contrectatio* to obtain this check; nor have the Jury found that there was on his part *a covinous obtaining*. No part of the evidence shews that, at the time

1812.

WALSH'S CASE.

this draft was delivered to the prisoner, he had any dishonest intention to convert it, or any part of its proceeds, to his own use.—SECONDLY. It is said that the notes became the property of the prosecutor at the very moment he received them from the banker, but how can such a conclusion be legally drawn, consistently with the decided case of *Rex* v. *Bazeley* (1), where the Judges held that the bill which *Bazeley* put into his own pocket instead of the drawer of his master, had, for that reason, never reached the possession of the master? So in the present case the notes received by the prisoner never reached the possession of his employer, and of course never vested in him. The check which was given to the prisoner for a particular purpose, was made payable to the prisoner or bearer: he might have kept it in his pocket; he might have paid it into his own banker; it was no part of the contract that he should carry it to *Gosling's*, whatever the expectation of the prosecutor might be upon that subject; and it was quite indifferent to him what became of it, provided that its amount was applied to the purpose for which it was given. What *trespass* therefore has been committed by the prisoner? a supposition has been made that if the prisoner had died suddenly with these notes about him, a court of equity would have interfered to preserve them as the property of the prosecutor; but the proceedings, in such a case, would have been guided by the circumstances of the prisoner at the time; if his creditors had claimed a right to these notes, they might probably be told that they could not have the property without a specific performance of the contract on which they had been received, namely, for the purchase of Exchequer Bills; or, supposing it the case of a trust, that the assignees could not take them without executing the trust: but these proceedings would rest on the principle, that the legal property was in the trustee; this therefore would shew that the legal property was in the prisoner: and I believe no case can be produced where A FRAUD between a *cestui que trust* and *a trustee* has been held to be felony. As to the answer to the question that this check is not within the statute; it is true the 2 Geo. II. c. 25. has been held to extend to the forgery of the will of a living testator, but that

(1) *Ante*, page 835. Case 811.

1812.

WALSH'S CASE.

does not affect the objection that this draft, in the hands of the drawer, is not an available security within that statute, because the forgery of *a Will* is within the very words of the Act, but a *banker's check* is not. Suppose a stranger were wrongfully to destroy a check prepared for use, the drawer could suffer nothing by it; it would not injure his property; for he would still have the same money in his banker's hands, and the same credit upon him as before; but if a person were to destroy *a Bill of Exchange* belonging to another, he would destroy a property valuable to the holder, and take from him that which is necessary to enable him to recover its value; but no injury whatever ensues from the cancelling of a check unparted with by its drawer. But this check has not been in any way misapplied by the prisoner; for his receiving the money on it, is no misapplication; it having been given to him for that purpose, under the expectation of the prosecutor that he would so apply it; and therefore it cannot be said to have been stolen from the prosecutor. And as no larceny has been committed of *the check*, the stealing, if any, must be of *the notes* which the prisoner received in payment of this check. BUT THIRDLY, supposing the property of these notes to have vested in the prosecutor; he has parted both with the property, and the possession of them to the prisoner. LARCENY certainly was originally defined to be *a taking without the knowledge of the owner*, but the ingenuity of subsequent times having contrived means to obtain property wrongfully, with the knowledge and consent of the owner, the law has construed those cases to be within the definition. THE FIRST CLASS of these cases is where the owner parts with the *manual possession* of goods, but retains the *legal possession* because he retains *the property*, as in the *Silk Throwster's Case* (1), who delivered silk to a workman to be worked up in his the prosecutor's own house, in which case it is clear that the property remained with the owner, although he had parted with the manual possession of it, and if purloined it is of course felony: So in *Rex* v. *Aickles* (2), where the prosecutor, though he delivered the bill to the prisoner for the special purpose of having it discounted and receiving the money, sent his clerk with the prisoner, whom he did not choose to trust the property

(1) *Ante*, page 252, *notis*.

(2) *Ante*, page 294. Case 146.

1812.

WALSH'S CASE.

to; in *Rex* v. *Campbell* (1), where the servant of the prosecutrix delivered the note of the prisoner without the authority of her mistress, who did not intend to part with it without first receiving the money; and in *Rex* v. *Oliver* (2), where on the prosecutor putting down notes in expectation of receiving gold in change, the prisoner, without the prosecutor's assent, took them up and ran away; there was in all these cases clearly *a trespass* committed on the property of the owner, and a taking of it against his will and consent.—THE SECOND CLASS of cases is, where the owner parts with the *legal possession* by delivery, but retains *the property* and *the ultimate possession* in himself, yet gives a possession to the other as against strangers, as where a man gives a chattel to a friend to keep (3), which is a mere charge or bailment, and in such case it is said that the trustee cannot commit felony by reason of the trust (3). The modern cases, although they approach, do not fully reach this principle, and therefore if a trustee, as in *the Carrier's Case*, violate the trust reposed in him, the *possession* which he had under the trust may be considered to revert to the original owner, upon the principle that the possession of personal chattels follow the property, and so makes the subsequent taking to be *a new taking* (4) without the owner's consent. Thus, in the case of *The Six Carpenters* (5), it is held that if a legal possession be given by the owner, a subsequent abuse of that possession, though it will make the offender a trespasser from the time that he exceeds the term of the trust will not make him a trespasser *ab initio*. The same principle applies to the case of a carrier, who opens a package delivered to his care, and steals the contents of it, because by opening the package he breaks the condition upon which he received it, and converts his former *legal possession* into a *new and tortious possession* obtained by fraud, which his merely *detaining the package* would not be, for that would be only a delayed continuation of the same possession. The reason indeed assigned by *Kelynge*, C. J. why a carrier opening the package and taking the goods is considered felony, is that the subsequent act is evidence of an original felonious intent, but this cannot be the true reason; for he might innocently detain the package for any given

(1) *Ante*, page 564. Case 253.

(2) *Ante*, page 1072.

(3) Glanvil, lib. 10. c. 18. on loans, mentioning the case of a man who lends to a friend for a specific purpose, who keeps the thing beyond the time, or applies it to another purpose, says *a furto omnimodò excusatur.*

(4) See 2 East, C. L.

(5) 6 Co. 290.

1812.

WALSH'S CASE.

length of time, and yet be guilty of a felony at the expiration of it(1). THE THIRD CLASS of cases is where the owner gives *a possession* not only as against strangers, but a *usufructuary possession* against himself, he still retaining the *property*; as in the case of letting a ready furnished lodging, the robbing of which was, at Common Law, no felony (2). The case of *Rex* v. *Raven*, though not so strong as *the Carrier's Case* (3), shews that where a delivery has been made upon a trust, no subsequent misapplication of the property can, at Common Law, be converted into a criminal offence while the legal possession continues. The reason why the *Silk Throwster's Case* (4) was holden to be felony, was because the delivery and the taking were in the owner's house, and therefore the property was never out of his possession by the delivery; but if a man send cloth to his taylor to make up, and he purloins it, this is no felony, notwithstanding its misapplication to another purpose. So where a weaver or other manufacturer embezzles the articles *delivered* out to him to be carried to his house and to be there worked up, such embezzlement is no felony (5), notwithstanding the subsequent misapplication: And LORD ELDON, in the case of *Cartwright* v. *Green* (6), proceeds upon the same principle, *viz.* that if the owner had delivered the guineas to *Green*, and had intended to part with them together with the bureau, the conversion of them would not have been felony. THE FOURTH CLASS of cases is where *the property* as well as *the possession* has been parted with by the owner, as in *Rex* v. *Nicholson* (7), *Rex* v. *Cath. Coleman* (8), and other cases, and in no one of these cases has it ever been held that a misapplication of things so circumstanced amounted to felony, although in every one of them it was found by the Jury that the prisoner had obtained the property fraudulently. The present case is exactly analogous to those cases. It has however been very ingeniously said that if the property passing from a consignor be stolen *in transitu*, the goods may be charged in the indictment to be his *property*, although he never intended to have *them* again; but that depends on the terms of the contract between the parties; for if the goods are delivered to the carrier at the risk of *the consignee*, they cannot be laid to be the pro-

(1) See Mr. East's reasoning on this subject, 2 East, C.L. page 696.

(2) Mary Raven's Case, Kely. 24 and 81. Rex *v.* Meers, 1 Show. 50.

(3) *Ante*, p. 33, text, and 252, *notis.*

(4) *Ante*, page 252, *notis.*

(5) See the statute which make this sort of offence a misdemeanor. Burn's Justice, title Servants.

(6) *Ante*, page 952. Case 334.

(7) *Ante*, page 616. Case 268.

(8) *Ante*, page 303, *notis.*

1812.

WALSH'S CASE.

perty of *the consignor*, for in such case he has parted with the property, and only looks for an equivalent in return: if indeed they are not at the risk of the consignee, they continue in *the possession* of the consignor, though in *the custody* of the carrier. All the cases of ring-dropping are cases where the property has been delivered only as *a pledge*, and has been run away with *alio intuitu*, and where there has been no delivery therefore of the possession. THE FIFTH CLASS of cases are those of *constructive felony*, as the cases of *Rex* v. *Pear* (1), and *Rex* v. *Major Semple* (2), which differ materially from the present case, as both of them were mere loans, the one of a horse, the other of a chaise for specified terms, the owners respectively never intending to part with the property, but each expecting it to be returned again at the expiration of the time for which they were hired; but in this case there was not only an intention to part with, but an actual delivery of the property in pursuance of that intention. It is like the case of a man who buys goods and never intends to pay for them. Daily instances occur where men upon the verge of bankruptcy continue to purchase goods which they know they will never be able to pay for; yet this will not constitute felony. So if a country tradesman were to remit a bill to his correspondent in *London* to purchase goods with on his account, and the correspondent instead of so doing were to convert it to his own use, such unfair dealing, however nefarious it may be, would not be felony. Nor can the misapplication of these notes in the present case amount to that offence; for *the contract* was perfected between the parties, and the property thereby transferred to the possession of the prisoner.

(1) *Ante*, page 212. Case 105.

(2) *Ante*, page 420. Case 196.

THE Judges took time to advise upon the law of this case; but no opinion upon it was ever publicly pronounced. The prisoner was shortly afterwards liberated: and

THE Legislature, in the same year, passed the statute 52 Geo. III., c. 63. which, as to this point, recites that, "Whereas it is usual for persons having dealings with bankers, merchants, brokers, attornies, or other agents, to deposit or place in the hands of such bankers, merchants, brokers, attornies, or other agents, sums of money, bills, notes, drafts, checks, or *orders for the pay-*

1812.

WALSH'S CASE.

ment of money, with directions or orders to invest the monies so paid, or to which such bills, notes, drafts, checks, or orders relate, or part thereof, in the purchase of stocks or funds, or in or upon Government or other securities for money, or to apply and dispose thereof in other ways or for other purposes; and that it is expedient to prevent embezzlement and malversation in such cases also (*a*); AND IT THEN ENACTS, That if any such banker, merchant, broker, attorney, or other agent in whose hands any sum or sums of money, bill, note, draft, check, or order for the payment of any sum or sums of money shall be placed, with any order or orders *in writing*, and signed by the party or parties who shall so deposit or place the same, to invest such sum or sums of money, or the money to which such bill, note, draft, check, or order as aforesaid shall relate, in the purchase of any stock or fund, or in or upon Government or other securities, or in any other way, or for any other purposes specified in such order or orders, shall, *in any manner*, apply to his or their own use and benefit any such sum or sums of money, or any such bill, note, draft, check, or order for the payment of any sum or sums of money, as hereinbefore mentioned, in violation of good faith, and contrary to the *special purpose* specified in the direction or order in writing, hereinbefore mentioned, *with intent* to defraud the owner or owners of any such sum or sums of money, every person so offending, in any part of the United Kingdom, shall in like manner be deemed and taken to be guilty of A MISDEMEANOR, and shall be sentenced to *transportation* for any term not exceeding fourteen years, or receive such other punishment as may by law be inflicted on a person or persons guilty of A MISDEMEANOR."

(*a*) The first clause directs, that if any person with whom (as banker, merchant, broker, attorney or other agent of *any description whatsoever*,) any of the securities therein mentioned shall have been deposited, or remain for safe custody, without any authority, either general, special, conditional, or discretionary, to sell or pledge the same, shall, in violation of good faith, and contrary to the special purpose for which they were deposited, sell, negotiate, transfer, assign, pledge, embezzle, secrete, or in any manner apply them to his own use, with intent to defraud the owner, such person shall be guilty of a misdemeanor, &c.

1812.

THE KING *against* GEORGE HAMMON.

CASE CCCLI.

If a banker's clerk tell a customer of the house, that he has paid in money on his account, and thereby induces the customer to give him a check for the amount, which he receives the money for, and afterwards makes fictitious entries in the books to prevent a discovery of the transaction, it is a *felonious taking* of the money from the banker without his consent, and not an obtaining of it under a *false pretence*.

S. C. 4 Taunton, 304.

AT the Old Bailey, in February Session 1812, *George Hammon* was tried before MR. JUSTICE BAYLEY, present MR. JUSTICE HEATH and MR. BARON WOOD, for stealing, on the 11th January 1812, two bank-notes of fifty pounds each, in the dwelling-house of *Thomas Birch* and *Abraham Henry Chambers*. The SECOND COUNT laid it to be the dwelling-house of *Thomas Birch*; THE THIRD, of *Abraham Henry Chambers*.

THE EVIDENCE.—The prisoner was the fourth clerk in the banking-house of the prosecutors, *Birch* and *Chambers*, in *New Bond-street*, and having been many years very intimately acquainted with a gentleman of the name of *John Vale*, a builder of considerable eminence in *Shepherd-street*, *May Fair*, he induced him to open his cash account at the house. The accounts of this house are kept in the following manner: All monies received into or paid out of the Bank are first entered in a waste-book or journal, which becomes the foundation of all other entries. On the debtor side of this waste-book there are two columns; in the one is entered the description of the person receiving the money, the numbers and dates of the notes or sums paid out to him, and the amount of each: in the other column is entered the description and amount of the instrument or order, in satisfaction of which the sum is so paid out. On the creditor side of this waste-book is entered, in like manner, the description of the person paying money into the Bank, and the dates, amount, and numbers of the notes paid in. From this waste-book the amount of the payment is transferred to a book called the cash-book, on the creditor side of which is nothing more than one column, headed "CASH" in the top line, and in each following line the abbreviation of "D°.;" and in another column the sum of each payment; on the debtor side of this cash-book is entered the name of the person paying the money, and the sum paid in. This cash-book is cast up every evening, and forms the regular check against the amount of the

1812.

HAMMON'S CASE.

money in the till. From the cash-book the entries of payment are transferred to the ledger, in which are kept distinct accounts between the bankers and each of their customers. There is also a fourth book, called "The customers' book," in which is entered each individual customer's account, forming a duplicate of each account respectively in the ledger. All the transactions which take place during the hours of business in every day, are, in the evening, entered in the cash-book, and thence transferred into the ledger, from whence each account is, at intervals, entered into the customers' book. Mr. *Vale*, from his intimacy with and friendship for the prisoner, was induced, very imprudently, to accommodate him, from time to time, with his bills and acceptances, for the payment of which the prisoner engaged to provide, by making payments into the banking-house on *Vale*'s account. On the 19th December 1811, the prisoner called on *Vale* with his banker's book, saying that he had that morning paid in 200*l.* to his credit, and shewing him an entry in the book, in the prisoner's hand-writing, to that effect, for which sum *Vale*, at the prisoner's request, gave him his note of hand at two months' date, on a proper stamp, produced to him by the prisoner. On the 10th January 1812, the prisoner called again on *Vale*, and returned to him this note of 200*l.* saying that as he did not immediately want it, he would be glad to have in lieu of it his check on *Birch and Chambers*, in favour of one *Plomer*, or bearer, for 100*l.* and his note for the other 100*l.*, both which *Vale* immediately gave him, and destroyed his former note for 200*l.*, dating, by the request of the prisoner, his check on the 9th instead of the 10th January, on which day it was in fact drawn. The prisoner's usual department in the Bank was to transfer the entries from the waste-book into the cash-book; but at times, when there was a press of business, he did officiously pay money for checks at the counter. It appeared also that he was occasionally unaccountably active in assisting the clerk, whose particular business it was to post the ledger, to perform, unasked, that service for him, especially during the time the clerk was absent at his meals, and particularly in

that ledger in which *Vale*'s account was kept: and it appeared, that on the 19th December an entry had been made in that ledger, in the prisoner's hand-writing, to the credit of *Vale*, of 200*l.* precisely corresponding with the entry he had before made to that amount in *Vale*'s banking book, but there was no entry whatever either in the waste-book or in the cash-book of such a sum having been paid in; nor had *Vale*, or any other person on his account, in fact, paid in any such sum. On the 10th January, while the regular cashiers were occupied by a temporary hurry of business, the prisoner was observed to place himself at the counter, by way of being ready to assist them; and during this time, it appeared, that he had made four entries in that page of the waste-book containing an account of monies paid. The second entry was in the column denoting the description of persons paying and notes received, *viz.* "Man,—50*l.* No. 15,451. and 50*l.* No. 10,790.—100*l.*" and opposite to it, on the other column, containing the description of the instrument on which the payment had been made, "100*l. John Vale*," which was understood to mean, that on that day *a man* had brought a check of *John Vale*'s, and that it was paid to that man by those two notes of 50*l.* each. These two notes had been received by the house in the course of the same day, and the check for 100*l.* given to the prisoner by *Vale* on that day was found among the other checks which had been paid that day. Upon the 11th January the balance of *Vale*'s account appeared to be in his favour, though, in fact, when the several fictitious sums, for which credit had thus been given him, was deducted, the balance was against him several hundred pounds. The general account of the transactions of the banking-house are taken yearly every Christmas, and the balance of the books compared with the cash then in hand; but on the settlement of the accounts for the year 1811 there appeared to be a considerable deficiency, and upon further examination it was discovered that this deficiency arose from Mr. *Vale*'s account, which, it appeared, as to this particular case, had been credited for 200*l.* which had never been paid in. The prisoner, on hearing that this discovery had been made, im-

1812.

HAMMON'S CASE.

mediately absconded; but he was traced to *Hithe*, in *Kent*, and afterwards to *Sandwich*, where he was apprehended, and the two notes, No. 15,451. and No. 10,790. of fifty pounds each, found upon him. The dwelling-house, in which the banking business is carried on, was in the occupation of Mr. *Birch* and his family, and the servants were his servants, but there was a bed always reserved for Mr. *Chambers*, who generally slept there when Mr. *Birch* was out of town.

THE COUNSEL *for the prisoner* objected, that as these notes had been paid by the prisoner in the usual course of business, in discharge of a real instrument drawn by a customer, who had a right to draw it on his bankers, and what they were compellable to pay if he had a balance there, the notes were properly and legally paid away; and that although there was gross fraud there was no felony.

THE COUNSEL *for the Crown* insisted, that as the prisoner had obtained possession of the check by fraud, and had fraudulently entered the fictitious credits, without which the check would never have been drawn, or if drawn, never would have been paid, this amounted to felony.

THE COURT left it with the Jury to consider, whether the prisoner had made the entry of 200*l.* to the credit of *Vale* on the 19th December 1811, and had afterwards contrived, knowing the money had not been in fact paid in, to post that entry fraudulently into the ledger with intent to impose on *Vale*, and thereby induce him to give the draft on the 9th January 1812, for the colourable purpose of enabling himself to take the two fifty-pound notes out of the possession of his employers, for that in such case it would be their duty to find him guilty.

THE JURY found him guilty; AND ALSO that he paid himself the money, and that at the time he made the false entries in the ledger, and in the customers' book, he did it fraudulently with design to enable himself to get the money of *Birch* and *Chambers*. THEY ALSO would have found that as the prisoner had the check, he had *a right to pay himself the money*; but the Court said that was a question of law of which the prisoner would have the benefit.

1812.

HAMMON'S CASE.

THE COURT reserved the point, it being *a new case*, for the consideration of THE TWELVE JUDGES, and it was argued in the Exchequer Chamber on the 25th April 1812, by LAWES, for the prisoner, and by GURNEY, for the Crown.

LAWES, *for the prisoner*, contended, that the representation made by the prisoner to *Vale* of his having paid 200*l.* on the 19th December into the banking-house, was the mean by which he obtained, first the check, and then the notes for 100*l.* and that therefore this offence was a *false pretence* within 30 Geo. II. c. 24., and not *a larceny*, within the 2 Geo. II. c. 25.; that the property thus obtained was a *fraud* committed on *John Vale*, and not a larceny committed on *Birch* and *Chambers;* and that if the transaction had stopped at this point, and no fictitious entries had been made, it would have been impossible to consider it felony; that in consequence of the prisoner's *false representations*, *Vale* was induced to give the prisoner this genuine check upon the credit of the balance which he supposed he then had in his bankers' hands; that *Vale*, having a right to draw that check, the prisoner, thus authorized, had a right to receive the money for it; and that *Birch* and *Chambers*, having it in their possession, might set it off against *Vale*'s account, and produce it as a voucher for money paid by his authority; that although *Vale* had, by the arts of the prisoner and by his own credulity, been induced to overdraw his account, and involve himself in a debt to *Birch* and *Chambers*, that debt may be recovered by them in an action for money paid on his account by his authority; that the circumstance of the prisoner having paid himself the amount of this check makes no difference in this case, for he was permitted by the prosecutors occasionally to receive and pay money at the counter in the course of their business; and although it was not his particular department, their continued permission gave him legal authority so to do; that if the prisoner had sent this check in through the hands of a third person, and it had been paid to that person by any other clerk, his receipt of these notes from such third person could not be considered as a taking from the prosecutors without their consent; and that his receipt of these notes

1812.

HAMMON'S CASE.

was merely an application made by him of their property, on the written authority of *Vale*, in the usual course of their business.

GURNEY, *for the Crown.*—The object of the prisoner was to obtain these notes feloniously from the possession of the prosecutors, and this check was fraudulently obtained by him as a mean to effect his intended purpose. The check, therefore, as far as he is concerned, may be considered an instrument of his own making and contriving; for by colour of it(1), he took the two notes from the drawer of the prosecutors, and thereby achieved the end he intended to reach. But if the transaction had remained at this point, an almost immediate discovery must have ensued, and therefore, the better to conceal what he had done, he artfully contrives to make all those false entries in the books of which he has been found guilty.

(1) See the Cases cited, 2 East's P. C. 660.

LORD ELLENBOROUGH, *Chief Justice.*—Whether a man opens the drawer at once and takes the money out, or whether he uses a circuity of contrivance in order to conceal the act, it is all the same. *Vale* was either very imprudent or very fraudulent to let another man keep cash in his account, and to have what may be called a rider on his own account. This is *fraudulenta contrectatio alienæ rei invito domino*; every part of the definition is satisfied: the entry the prisoner relies on as making it the act of the house, is his own act. It is only a foolish shuffle to escape detection: he gains nothing but time by it: he takes it out with the right hand, and pays it to the left.

MANSFIELD, *Chief Justice.*—He steals two notes out of the drawer, and uses this foolish contrivance afterwards to cover it.

LE BLANC, *Justice.*—It was left to the Jury, and they have found the fact.

WOOD, *Baron.*—The prisoner had money, and, as is frequent among bankers' clerks, requested *Vale*'s permission to put it into the bank to *Vale*'s account, and to draw it out by checks drawn by *Vale.*

MR. JUSTICE GROSE, in May Session 1812, delivered the

1812.

HAMMON'S CASE.

opinion of the Judges to the following effect. The prisoner was tried in February last on the charge of stealing two Bank of England notes of the value of 50*l.* each, in the dwelling-house of *Thomas Birch* and *Abraham Henry Chambers.* The Jury found him guilty, AND ALSO that he had made certain false entries in the books of the prosecutors fraudulently and with the design the better to enable himself to obtain the said property from and out of their possession. It appeared, that on the 19th December 1811, he made a fictitious entry in the banking-book of a Mr. *Vale*, a customer to the house, to his credit for 200*l.*, which sum he told *Vale*, that he, the prisoner, had that morning paid in on *Vale*'s account. On the belief that this false entry and false assertion were true, he, Mr. *Vale*, on the 10th January 1812, gave him a check on *Birch* and *Chambers*, dated, by the prisoner's desire, the day before, for 100*l.*, and for payment of which the prisoner, under colour of serving at the counter, took out of the prosecutors' bank-note drawer in the shop the two notes stated in the indictment, depositing the check among the other paid checks of the day, and making in the waste-book an entry of such payment. By this contrivance, and other previous practices of the like kind, Mr. *Vale*'s real balance was turned against him to the amount of several hundred pounds. But it was necessary to do something more in order to prevent the discovery which must have immediately ensued if the accounts had been suffered to continue in this state; the prisoner, therefore, made other false entries to the credit of Mr. *Vale* in the ledger of the house. On these circumstances a question was reserved for the consideration of the Judges, whether the prisoner is guilty of *felony* in stealing these notes from *Birch* and *Chambers*, or of *a fraud* only, in obtaining them, on the check, by false pretences from *John Vale*. Now the true meaning of larceny is "the felonious taking the property of another without his consent and against his will, with intent to convert it to the use of the taker." The facts of the case answer every part of this definition. The taking of the property is clear, and that it was taken against the will of the owner, and with a

1812.

HAMMON'S CASE.

felonious intent, is equally clear from the circumstance of the prisoner's having fraudulently made these *false entries* with a view to conceal the means he had artfully made use of to obtain it. The Judges, therefore, are of opinion that this is a larceny, and that the prisoner has been rightly convicted of stealing these notes in the dwelling-house of the prosecutors, under the statute 2 Geo. II. c. 25. and 12 Ann. c. 7.

CASE CCCLII.

THE KING *against* THOMAS RANSON.

If a servant of the Post-Office steal a letter containing the *paid notes* of a country ban which came into his hands as a facer of letters, it is felony within the 7 Geo. III. c. 50. s. 1. though such notes were only *in transitu* from the London bankers who paid them, to the country bankers, for the purpose of being re-issued.

AT the Old Bailey, in May Session 1812, *Thomas Ranson* was tried before MR. BARON GRAHAM, on the statute 7 Geo. III. c. 50. s. 1.

THE indictment contained eight counts. THE FIRST COUNT charged that *Thomas Ranson*, on the 17th of April, in the fifty-second year, &c. at *St. Mary Woolnoth*, was a person employed in certain business relating to the Post-Office, that is to say, in facing letters and packets brought to the General Post-Office in *London*, to be from thence sent by the post; and that on the same day, at, &c. *in* the said General Post-Office, a certain letter to be sent by the Post from *London* to *Tamworth*, for and to be delivered to *Samuel Tuffley Harding*, *Charles Oakes* and *Thomas Willington*, and containing thirty promissory notes, each for the payment of five pounds, came to his hands and possession; and being such person so employed as aforesaid, having the said letter, containing the said promissory notes, in his hands and possession, feloniously did secrete the said letter, containing the said promissory notes, being the property of *Thomas Dorrien*, *Magens Dorrien Magens*, *Thomas Dorrien* the younger, and *John Mello*. THE SECOND COUNT charged him with feloniously stealing from and out of the said letter two of the said promissory notes, the property of the said *Thomas Dorrien*, &c. THE THIRD and FOURTH COUNTS were the same as the two former, only stating the said promissory notes to be the property of the said *Samuel Tuffley Harding*, &c. THE FIFTH COUNT was for *secreting the letter* containing the promissory notes. THE SIXTH COUNT was for feloniously stealing from and out

of the letter TWO of the said promissory notes. THE SEVENTH COUNT was for stealing from and out of the Post-Office at *London*, a letter brought to the said Post-Office, to be sent from *London* aforesaid to *Tamworth*; and THE EIGHTH COUNT was the same as the seventh, only for stealing *a packet* instead of *a letter*.

THE EVIDENCE.—The prosecutors, Messrs. *Dorriens and Mello*, bankers, in *London*, on the 17th April 1812, delivered a letter into the General Post-Office, directed to *Harding, Oakes, and Co.* at *Tamworth*, inclosing thirty notes of the *Tamworth Bank* of five pounds each, which had been made payable at the banking-house of *Dorrien and Mello*, in *London*, and had been paid by them. The object of this conveyance was to return these paid notes to the partners in the *Tamworth* Bank, in order that they might have the opportunity of reissuing them: the practice is to reissue them precisely in their original form, without making any mark on them to denote that they have been issued before or paid. The letter, in which these paid notes were inclosed, should have reached the *Tamworth Bank* in the morning of the ensuing day, the 18th April, but it did not arrive there until the 19th, at which time it had the *London* Post-mark stamped on it of the 18th April; and, on opening it, it only contained twenty-eight instead of thirty of the said notes; two of them, *viz.* No. 4,927 and No. 4,952 being missing. The letter in which these thirty notes were originally inclosed, was, when put into the Post-Office in *London*, secured by two wafers, but on its arrival at *Tamworth*, it was both wafered and waxed; and the letter gave advice that thirty notes had been inclosed in it when it was delivered into the General Post-Office. It appeared that the prisoner, on the 21st of April 1812, went to the shop of Mr. *Ravenhill*, a linen-draper, in *Barbican*, and purchased drapery to the amount of two pounds, for which he offered a five pound *Tamworth* bank-note in payment, and on Mr. *Ravenhill* expressing a wish to have Bank of England Paper, the prisoner said he had nothing about him but another *Tamworth* bank-note of five pounds, which he produced. Mr. *Ravenhill*.

1812.

RANSON'S CASE.

took the one that was numbered No. 4,927, and gave him change, with which he went away. It also appeared that the prisoner was employed in the Post-Office as a facer of letters; that he was on his duty at the Office on the evening of the 17th April, when this letter was delivered into it; and that, during such employment, he had an opportunity of secreting letters, if he had a mind so to do.

KNAPP, *for the prisoner*, submitted two questions to the consideration of the Court. FIRST, That there was no direct proof of his having secreted *the letter*, it not having been seen in his hands or traced into his possession, or any evidence given to shew that HE ever had it, excepting that which resulted from the fact of his having negotiated one of the papers contained in it, which paper he might have received by other means. SECONDLY, That as the money which these notes were intended to secure had been paid to the respective holders of them by *Dorriens and Mello*, they could no longer be considered as promissory notes; they not having been reissued pursuant to the statutes 44 Geo. III. c. 98. and the 48 Geo. III. c. 149. s. 13. by which it is enacted, That AFTER *they shall be* REISSUED they shall be as good and valid, to all intents and purposes, as they were upon the first issuing the same.

THE Jury found the prisoner guilty, but the case was saved for the opinion of THE TWELVE JUDGES.

MR. JUSTICE LE BLANC, in July Session 1812, delivered the opinion of the Judges to the following effect:—The prisoner was convicted at the last Sessions, on an indictment which charged that he, being employed in the Post-Office as a facer of letters, did, on the 17th April, secrete a letter which had been delivered into the said Office to be conveyed from *London* to *Tamworth*, which letter contained thirty promissory notes, which were charged to be of *the value* of five pounds each. This letter, it appeared, was put into the Office in the afternoon of the *seventeenth of April*, at which time the prisoner was on his duty in the Office into which it was delivered, and through whose hands it would, in its regular course, pass; that it did not reach *Tamworth* until the

1812.

RANSON'S CASE.

nineteenth, when it bore the *London* Post-mark of the *eighteenth*; and that it then contained only twenty-eight notes instead of thirty. It was also clearly proved, that the prisoner, on the *twenty-first* of April, tendered one of these two missing notes, No. 4,927, to a linen-draper in *Barbican*, and that he then had in his possession another five-pound note of the like description; and on this evidence the Jury were satisfied of his guilt. But it was contended, that sufficient proof had not been given of his having *secreted the letter*; but on this point the Judges are of opinion, that no doubt whatever can be entertained. It was also objected that the notes contained in this letter could not be considered as *promissory notes*, the money having been paid to the holders of them, while they possessed the character of promissory notes, by the bankers in *London*, and that as they had not been reissued in pursuance of the statutes, they had not been revived, as those statutes direct, and therefore were not good and valid promissory notes. But a majority of the Judges are of opinion that these notes, though not reissued, still retain the character, and fall within the description of *promissory notes*; that they are, as promissory notes, valuable to the owners of them; that the verdict given in this case is right in law; and that the prisoner is consequently liable to the punishment inflicted on this offence by the statute on which the indictment is founded.

CASE CCCLIII.

THE KING *against* JOHN BRUCE.

The Courts of Common Law have concurrent jurisdiction with the Admiralty Courts in murders committed in *Milford Haven*, and in all the other havens, creeks, and rivers in this realm.

AT the Admiralty Session holden at the Old Bailey in the year 1812, *John Bruce* was tried before LORD ELLENBOROUGH, C. J. for the wilful murder of a Ferry Boy, of the name of *James Dean*.

THE evidence of the fact was extremely clear, and was fully confessed by the prisoner himself at the trial, and the Jury found him guilty.—BUT it also appeared that *the place* in which this murder was committed is a part of *Milford Haven*, in the passage over the same between *Bulwell* and the opposite shore, near to the town of *Milford*; the passage being there

1812.

BRUCE'S CASE.

2 Hale, 17.
3 Inst. 113.
2 Hawk. c. 9. s. 14.
1 Bac. Abr. 751.
Andr. 232.
2 East's P. C. 803.

about *three miles* over. It was about *seven* or *eight miles* from the mouth of the river or open sea, and about *sixteen miles* below any bridges over the river: the water there, which was always perfectly salt, was generally above twenty-three feet deep, and the place was, excepting at very low tides indeed, never known to be dry. Men of war of seventy-four guns were then building near an inlet close by the place. In spring tides sloops and cutters of one hundred tons burthen are navigable where the body was found, which is also nearly opposite to where men of war ride. The deputy Vice-Admiral of *Pembrokeshire* said, that he had of late employed his water bailiffs to execute process in that part of the haven; but there was no evidence either way, as to the execution of the Common Law process there.

THE COURT upon this evidence left the case to the Jury, with observations as to the situation of the place, whether it was within the jurisdiction or not, and the Jury found the prisoner guilty; but the case was saved for the opinion of THE TWELVE JUDGES.

THE QUESTION was, whether the place where the murder was committed, was to be considered as within the limits to which commissions granted under the statute 28 Hen. VIII. c. 15. for the trial of the offences therein mentioned, "committed in or upon the sea, or in any other haven, river, creek, or place, where the Admiral or Admirals have or pretend to have power, authority or jurisdiction," do by law extend.

THE JUDGES, with the exception of MR. JUSTICE GROSE, all assembled on the 23rd December 1812, at LORD ELLENBOROUGH'S Chambers, to consider this question; and they were unanimously of opinion that the trial was properly had, and that there was no objection to the conviction, on the ground of any supposed want of jurisdiction in the Commissioners appointed by commission under the statute 28 Hen. VIII. c. 15. in respect of *the place* where the offence was committed.—During the discussion of this point, the construction of this statute by *Lord Hale* in his Pleas of the

Crown (1), was much preferred to the doctrine of *Lord Coke* in his Institutes (2): and most, if not all of the Judges seemed to think that the Common Law had a concurrent jurisdiction in this haven; and in other havens, creeks and rivers in this realm.

1812.

BRUCE'S CASE.

(1) Vol. II. pages 16 and 17.

(2) 3 Inst. 111. 4 Inst. 134. 2 Hawk. c. 33. s. 41. 2 East's P. C. c. 17. s. 10.

THE KING *against* MARY COLE.

CASE CCCLIV.

A woman tried on the Coroner's Inquest for *the murder* of her bastard child, may be found guilty under 43 Geo. III. c. 58. s. 4. of *endeavouring to conceal* its birth.

3 Campbell's Rep. 371.

AT the Lent Assizes at *Gloucester* 1813, *Mary Cole* was charged before MR. JUSTICE BAYLEY, on THE CORONER'S INQUISITION, with having murdered her bastard child: a bill of indictment had been preferred against her for the same offence, but THE GRAND JURY threw out the bill, there not being sufficient evidence to prove her guilty of the murder.

THERE was clear evidence however that the prisoner had concealed the birth of this child. A question was therefore made whether she could be found guilty of *the concealment* under the statute 43 Geo. III. c. 58. s. 4. which repeals the statute 21 Jac. c. 27. and enacts "That the trials of women charged with the murder of an issue of their bodies, male or female, which being born alive would by law be bastard, shall proceed and be governed by the like rules of evidence, and of presumption, as are by law allowed in respect of other trials of murder, PROVIDED that it shall be lawful for the Jury, by whose verdict any prisoner, charged with such murder, shall be acquitted, to find, if it so appear in evidence, that she did, by secret burying or otherwise, endeavour to conceal the birth thereof: AND THEREUPON it shall be lawful for the Court to commit such prisoner to the common gaol or house of correction, for any time not exceeding two years."

CAMPBELL, *for the prisoner*, contended that this statute authorizes the Jury to find such a verdict, only in cases where the prisoner is *indicted* for murder, and does not apply to cases on the *Coroner's Inquest*, where the indictment has been returned not true by the Grand Jury.

THE COURT said that the point had been submitted to the

1813.

COLE'S CASE.

consideration of THE TWELVE JUDGES in a case from the Home Circuit, tried before THE LORD CHIEF BARON, and that they were all of opinion that a prisoner may, under such circumstances, be found guilty of the concealment, whether charged with the murder by the coroner's inquisition, or by a bill of indictment returned by the Grand Jury.

THE prisoner was found guilty of the concealment, and sentenced to four months' imprisonment.

CASE CCCLV. THE KING *against* JOHN MORRIS AND SARAH MORRIS HIS WIFE.

If *a wife*, by the incitement of her husband, knowingly utters, *in his absence*, a forged order and certificate for the reception of prize-money, under 43 Geo. III. c. 123. they may be indicted together, SHE as *a principal* on the statute, and HE as *an accessary before the fact* at Common Law, and if convicted she may be punished with death, and he by fine and imprisonment.

AT the Lent Assizes at *Maidstone* 1814, the prisoners *John Morris* and *Sarah* his wife, were tried before MR. BARON RICHARDS, on the 49 Geo. III. c. 123. s. 13. the wife as *a principal* in forgery on the statute, and the husband as an *accessary before the fact* at Common Law (*a*).

(*a*) Forgery at Common Law is considered only as a misdemeanor, and therefore whatever would make a man *accessary before the fact* in felony, will make him *a principal* in forgery. 3 Inst. 169. 1 Hale, 684. 2 Hawk. c. 29. s. 2. But where a statute creates *a new felony*, as in this case, it incidentally and necessarily draws after it all the concomitants of felony, namely, accessaries before and after. 2 East's P. C. 974. Therefore, where *William Soares*, *William Atkinson*, and *John Brighton*, were tried before LE BLANC, J. at *Winchester* Spring Assizes 1802, as principals, for knowingly uttering a forged bank-note to one *Newland*, at *Gosport*, on the 1st August 1801, it appeared that the prisoner, *John Brighton*, in the absence of the other prisoner, uttered the note; and that neither *Soares* or *Atkinson* were at the time in *Gosport*, but both of them were waiting at *Portsmouth* until *Brighton* should return to them; it having been *previously concerted between the three prisoners* that *Brighton* should go over the water from *Portsmouth* to *Gosport* for the purpose of passing the note, and, when he had passed it, should return to join the other two prisoners at *Portsmouth*; they all three knowing that it was a forged note, and having been concerned together in putting off another note of the same sort, and in sharing the produce among them; it was objected that *Soares* and *Atkinson* appeared to be accessaries before the fact, and not principals, as charged in the indictment; and on the case being reported to THE TWELVE JUDGES, they were unanimously of opinion, that the prisoners were im-

1814.

MORRIS'S CASE.

THE statute AFTER RECITING that further provision is necessary to prevent the fabrication of orders and certificates, intitling persons to receive prize-money due to seamen and others, ENACTS, That all shares of prize-money due to any petty officer in his Majesty's naval service, shall be paid by the clerk of the Cheque of *Greenwich Hospital*, to the person intitled thereto, or to any other person authorized to receive the same, by any order in the form or to the effect set forth in the schedule, which order shall specify the name of the prize, the place of the capture, and the name of the vessel on board which the person making the order was serving at the time of such capture; and that the person making such ORDER shall also procure A CERTIFICATE, in the form and to the effect set forth in the said schedule, which certificate shall contain a full description of the person making such order, and shall be signed by the captain, and one other signing officer of the vessel, in which the person making such order shall be then serving; and that if the person making such order shall be discharged from the service, then the certificate shall be signed in a different way as directed by the Act, &c. &c. and then the statute CONCLUDES, "That if any person or persons shall falsely make, forge, or counterfeit, OR cause or procure any other person or persons falsely to make, forge or counterfeit, OR shall willingly act or assist in the false making, forging or counterfeiting any such order or certificate as above specified, OR shall utter or publish as true any such false, forged or counterfeited order or certificate, knowing the same to be false, forged or counterfeited, with intent to defraud any person or persons, or any corporation, every such person shall be deemed guilty of felony, and suffer death as a felon without benefit of clergy."

THE INDICTMENT consisted of twenty-four counts. The

properly charged as principals, they not being present at the time of the uttering. 2 East, c. 19. s. 52. See also the Case of Rex v. Brady, O. B. June Session 1813, where GRAHAM, B. cites a Case before the Judges from *Derby*, to the same effect. Starkie's Criminal Pleadings, page 80, *notis*. But no *assent* given after the note has been uttered will make the person so assenting an *accessary after the fact* in forgery. 1 Hale, 694. 1 Sid. 311. 2 East, 973.

1814.

MORRIS'S CASE.

first count charged, that *Sarah Morris* on 8th December 1813, feloniously did falsely make, forge, and counterfeit, a certain order and certificate for receiving certain prize-money which had become due to *Henry Taylor*, a petty officer in his Majesty's naval service, THE TENOR of which said order and certificate is as follows, (that is to say)

"TAKE NOTICE, That no prize-money can be received under this order, except by an Agent duly licensed in conformity to the Act of Parliament of the forty-ninth year of King George the Third, or by the wife, one of the parents, or children of the grantor."

"NAVY OFFICE, LONDON,

Thirteenth Day of November 1813.

AT SEVEN DAYS SIGHT, pay to *Mrs. Sarah Morris*, or her order, the amount of my share of prize or bounty money, for the capture of *the Teresia*, when serving on board His Majesty's ship or vessel the *Frederickstein*, in quality of *Caulker*.

To the Agent for the said capture, or the proper officers of *Greenwich Hospital*. } HENRY TAYLOR.

THESE ARE TO CERTIFY, that we have examined the said *Henry Taylor*, who signed the above order in our presence, and from the documents he has shewn us, and his answers to our questions, we have reason to believe that he was serving on board the said ship at the time of making the capture above specified. He says he was born at *Whitby*, in the county of *York*; that he is 38 years of *age*, of a sandy complexion, brown eyes, and sandy hair.—GIVEN under our hands, on board His Majesty's ship *Gladiator*, this thirteenth day of November one thousand eight hundred and thirteen.

Charles Hewitt, Captain."

with intent to defraud the Commissioners and Governors of the Royal Hospital for seamen at *Greenwich*, in the county of *Kent*, against the statute, &c.—AND THAT *John Morris* at *Greenwich* aforesaid, before the felony and forgery aforesaid was done and committed in manner and form aforesaid, TO

WIT, on the 8th day of December in the 54th year, &c. at the parish of *St. Mary Lambeth* in the county of *Surry*, TO WIT, at *Greenwich* in the county of *Kent*, feloniously did incite, move, counsel, aid, abet, cause, and procure the said *Sarah Morris* the felony and forgery last aforesaid, in manner and form last aforesaid to do and commit, against the form of the statute, &c. and against the peace, &c. The second count was the same as the first, excepting that it charged *Sarah Morris* with having knowingly uttered the order and the certificate by the incitement of the said *John Morris*. The third and fourth counts charged the forging and uttering to be with intent to defraud *Henry Taylor*. Eight other similar counts were confined respectively, 1st to the order, and 2dly to the certificate. Three other counts charged the forging, uttering and disposing of an order for payment of money, (setting forth the order and certificate,) and omitting to state it to be for prize-money due to *Taylor*, with intent to defraud *Greenwich Hospital;* three other counts with intent to defraud *Henry Taylor;* and six other counts similar to the six last, only omitting to set forth the certificate.

THE EVIDENCE.—*Henry Taylor*, whose name purported to be subscribed to the order, was, in the year 1811, a petty officer of about 25 years of age, acting as a caulker on board his Majesty's frigate the *Frederickstein*. This frigate, while he was so acting on board her, had captured a rich vessel called the *Teresia*, on which capture he was intitled to a certain share of prize-money. But it appeared by the testimony of a shipmate, who had constantly acted as his amanuensis, that he was unable to write even his name, and was always obliged to make *a mark* whenever his signature was required. It also appeared that there was not any other man named *Henry Taylor* on board the said frigate when the capture was made. The prisoner, *Sarah Morris*, who was the wife of the other prisoner, *John Morris*, and the real or pretended daughter of *Henry Taylor*, applied, in the month of November 1813, to *Mr. Sedgwick*, a clerk in the Cheque Office in *Greenwich Hospital*, for the payment of the prize-money due to *Henry Taylor* of the *Frederickstein* frigate,

1814.

MORRIS'S CASE.

producing and leaving with him, at the same time, the order stated in the indictment. The prize-money for the *Teresia* had not, at that time, been remitted to the office, and *Sarah Morris* was desired to call again in about ten days, when the account should be examined. She called again however on the 25th November, which was only four or five days after, and expressed great anxiety to be immediately paid the money, but she was told that the money had not yet come in; and the order for its payment was given back to her, with a request that she would not apply again until she was duly informed that the money had been remitted to the office. Almost immediately after this interview the other prisoner *John Morris* wrote a letter to *Richard Smith, Esq.* the clerk of the Cheque on the subject; and, on the 8th December, Mr. *Smith* gave information to *Sarah Morris* that the prize-money for the *Frederickstein* had just then come in, and desired her to call and receive the share of it, to which *Henry Taylor* was intitled. She accordingly went to the office and produced the same order and certificate to *Mr. Smith*, who immediately gave directions to one of his clerks to prepare a warrant for its payment. She appeared to be in great distress, and was very anxious to receive the money; but before the clerk had finished the warrant, a seaman entered the office and applied for the payment of the same prize-money, producing, at the same time, an order for it under the signature of *Henry Taylor*, and a certificate signed by *Charles Hewitt* the captain of the *Gladiator*, with whom it was stated *Henry Taylor* was then serving. *Mr. Smith* on comparing these instruments found that each set was signed in the same names; and his suspicion being awakened by this circumstance, he shewed the two certificates to *Sarah Morris*, observing to her, at the same time, that one of them must necessarily be a forgery. She replied that she was certain her certificate was not a forgery; for that *Henry Taylor* was her father; that he had lately been in *London*; that he was then disposed to give her his order to receive the money to enable her to return to *Whitby* the place of her nativity; but that on her applying to the Navy Office they would not allow it, for that, as *Henry Taylor* was in actual service,

1814.

MORRIS'S CASE.

the order must be signed by *Captain Hewitt* himself before it could be passed; and that she had afterwards received by the post the paper then produced. *Mr. Smith*, however, told her, that, under these circumstances, he could not pay her the money until he had made further inquiries of the captain; but she persisted in her entreaties to him to pay her the money, saying that she had, on the faith of receiving it, already taken her place to *Whitby*, and that, otherwise, she must lose the money, as she had paid for her fare. *Mr. Smith* recommended her to go to *Whitby*, and kindly promised that if all turned out right, he would be at the trouble and expense of sending the money after her; to which she replied that if she could not have the money then, she would rather remain at her lodgings until the inquiry was made: She then went away. It turned out, on the testimony of Captain *Charles Hewitt*, that he had commanded *the Gladiator* for one year and eight months; that during that time there had been no man of the name of *Henry Taylor* serving on board her; and that the name *Charles Hewitt* subscribed to the certificate was not his hand-writing. The two prisoners, upon this discovery, were apprehended at their lodgings at No. 33, *James Street*, *Lambeth Marsh*. Their landlord, *John Frewen*, also proved that the prisoner *John Morris* had, in two or three instances, ordered his wife *Sarah Morris* to go to *Greenwich Hospital* respecting about 30*l.* of prize-money, due to *Henry Taylor* his wife's father; that he was constantly talking of having been *Henry Taylor*'s shipmate; that, at one time, *Sarah Morris* told her husband that she had been to *Greenwich*; that the prize-money was not then ready; that the office had not yet received it; and that he, the witness, had lent the prisoner *John Morris* money upon a belief that he had prize-money to receive. He also swore that he really believed that *Sarah Morris* went to receive it in obedience to her husband's orders. Of this fact the prisoner *John Morris* had, in the presence of *Mr. Smith*, signed a paper stating that his wife had acted in this business entirely under his orders and directions. It was also proved by one *James Hall*, who had formerly been a captain's clerk in the navy, that in the month of November 1813, the pri-

1814.

MORRIS'S CASE.

soner, *John Morris*, represented to him that there was about thirty pounds prize-money due to his father-in-law, *Henry Taylor*, as a caulker in the *Frederickstein Frigate*, with whom he had served some years on board that very frigate; that he did not like to go to a Jew upon the subject; and that he would be obliged to him if he would fill up *the blanks* in certain papers which he produced, and which he the witness did do, excepting the signatures; that on observing there was a spare half sheet to the papers he so filled up, he advised the prisoner, *John Morris*, to send it by the post to his father-in-law; but that he replied that his wife was going to *Portsmouth* on board *the Gladiator*, and that she would get it done; that he afterwards met *John Morris*, who then told him that he had got the papers regularly signed by *Henry Taylor* and *the Captain*, and that he was going to send his wife to *Greenwich Hospital* for the money.

THE COUNSEL *for the prisoners* submitted to the consideration of the Court, that as *Sarah Morris*, in the part she took in this transaction, had clearly acted under the directions and coercion of her husband, she could not be found guilty (*a*), and that if she was innocent as a principal, the other prisoner could not be guilty as an accessary; but that in any event *John Morris* could not be considered an offender within the words of the statute 49 Geo. III. c. 163.

THE Jury found both the prisoners guilty; but the Court delayed passing sentence, and reserved the case for the consideration of THE TWELVE JUDGES.

MR. JUSTICE LE BLANC, at the Summer Assizes, ordered the prisoners to the bar, and told them that THE JUDGES were unanimously of opinion, that she, *Sarah Morris*, was guilty of uttering the forged instrument knowing it to be forged, and that *John Morris* her husband was also guilty of the offence

(*a*) A wife cannot commit *larceny* in the company of her husband, for it is deemed his coercion, and not her voluntary act; yet if she do it *in his absence, and by his mere command*, she is then punishable as if she were sole, and the husband, it is said, may be accessary to the wife. 1 Hale, 45. Staunford, 26. 2 East's P. C. 559.

with which he was charged in the indictment as an accessary before the fact at Common Law. 1814.

MORRIS'S CASE.

THE COURT proceeded to pass sentence of death on *Sarah Morris*, but the execution was respited, and she was afterwards pardoned on condition of transportation: and *John Morris* was ordered to be imprisoned one year in *Maidstone* Gaol.

THE KING *against* JOHNSON.

CASE CCCLVI.

AT the Spring Assizes for *Lancashire*, 1814, the prisoner was tried before MR. JUSTICE LE BLANC, on the Embezzling Act of 39 Geo. III. c. 85. for embezzling nine bank-notes of the value of nine pounds, the property of the Trustees of the *Liverpool Dock*.

An indictment on 39 Geo. III. c. 85. charging the prisoner, in one count, with having embezzled "nine *bank-notes*, amounting to and of the value of nine pounds, the said bank-notes being the property of *The Trustees of the Liverpool Dock*;" and, in another count, with "*a larceny* on the 2 Geo. II. c. 25." is good, notwithstanding this *joinder*, and though it do not set out the *particulars of each note*.

THE INDICTMENT contained nine counts. The first count charged, that the prisoner was clerk to the Trustees of the *Liverpool Dock*, and, being such clerk, did, by virtue of his said employment, as such clerk aforesaid, receive and take into his possession, for and on account of the said *Trustees of the Liverpool Dock* (1), divers, TO WIT, nine *bank-notes*, for the payment of divers sums of money (*a*), amounting in the

(*a*) In a very excellent and useful work recently published by MR. STARKIE, intitled, "*A Treatise on Criminal Pleading*," from which the above case has been extracted, it is said that this *general description* was held sufficient by CHAMBRE, J. in the Case of Rex *v.* Simpkin, 2 Starkie, 429, *notis*.—In Rex *v.* Campbell, for stealing a bank-note, the indictment charged him with stealing "one promissory note, called a bank-note," *ante*, page 564. Case 253. So in Rex *v.* Nicholson and others, for stealing a Bank post bill, it was described to be "a promissory note, called a Bank post bill," *ante*, page 610. Case 268. In the Case of Rex *v.* Peter Milnes, before HEATH, J. *Worcester* Summer Assize, 1800, the prisoner was indicted on 12 Ann. c. 7. for stealing in a dwelling-house goods and chattels to the value of 23*s.* and also "a promissory note for the payment of one guinea," and also "one other promissory note for the payment of five guineas;" and on the question Whether the notes were sufficiently described, being referred to THE JUDGES, many precedents were adduced of indictments drawn in the same *general manner* with respect to *bank-notes* and *bank post bills*, and some of private promissory

(1) See Rex v. Patrick and Pepper, *ante*, page 253. Case 127. and Rex v. Sherrington and Buckley, *ante*, page 513. Case 233.

1814.

JOHNSON'S CASE.

whole to a certain sum of money, TO WIT, the sum of nine pounds of lawful money of *Great Britain*, and of the value of nine pounds, of like lawful money; AND THAT having so received and taken into his possession the said bank-notes for and on account of his said employers, the said Trustees of the *Liverpool Dock*, &c.: he afterwards, &c. with force and arms, &c. fraudulently and feloniously did embezzle and secrete the same: AND SO THE JURORS, &c. do say, that he, &c. in manner and form aforesaid, feloniously did steal, take, and carry away the said bank-notes from his said employers, the said Trustees, &c. the said bank-notes being the property (1) of the said Trustees, &c. in whose account the same was received, &c. &c. &c. The second and third counts were the same as the first, except charging the prisoner, 1st, as being *employed* as a clerk; and, 2dly, as being *a servant* to the Trustees. The three next counts were the same, except that they averred the bank-notes to be the property of H. C. *against the statute*. But the seventh count charged that he did feloniously steal, take, and carry away divers, TO WIT, nine bank-notes, &c. &c. &c. as *for a larceny* on the statute 2 Geo. II. c. 25. which makes the offender guilty in like manner, as he would have been *at Common Law* if he had stolen goods of the value with the notes.

(1) See Rex v. McGregor, *ante*, page 932. Case 330.

THE Jury found the prisoner guilty.

THE COUNSEL *for the prisoner* submitted two objections to the Court in arrest of judgment. FIRST, that the indictment did not charge the prisoner with having embezzled any one bank-note of a specified amount and value. SECONDLY, That it had improperly joined a felony at *Common Law* with a felony *under the statute*.

notes: and all the Judges held the indictment well laid. 2 East, P. C. 602. But in a subsequent Case of Rex *v.* Craven, before LORD ALVANLEY, *Lancaster* Summer Assizes 1801, on 2 Geo. II. c. 25. for stealing "a certain note, commonly called a bank-note," setting out its purport, the Judges held the indictment ill laid, as, in describing the property stolen, it did not follow any of the descriptions of property in the statute. 2 East's P. C. 601.

1814.

JOHNSON'S CASE.

THE COURT were of opinion, FIRST, That as the statute 39 Geo. III. c. 85. had particularly mentioned "bills and *notes*," it was sufficient to state them as "bank-notes for the payment of money," without averring the amount and denomination of each. And, SECONDLY, That as to the alleged misjoinder, the answer was, that both the offences were *felonies*, and both of them *larcenies*: THAT, though it might have been more consistent if the statute 39 Geo. III. c. 85. had enacted, "That the offence should be considered grand larceny," and had authorized the Court to direct the offender to be transported, yet that the proper judgment might be given on a conviction on any one count (*a*); that where offences are of the same nature (*b*), their joinder cannot be taken advantage of in arrest of judgment; that in the present case the offences are of the same nature, and the prisoner equally intitled to his challenges; and that upon a case which was tried at the Old Bailey (1), where the prisoner was indicted for uttering a number of forged receipts, THE JUDGES held, that it was always a matter of discretion in the Court, where different offences of the same nature were charged in the same indictment, to put the prosecutor to his election, but not a ground for arresting the judgment (*c*).

(1) Perhaps Rex v. Thomas, *ante*, page 877. Case 818.

THE prisoner afterwards brought A WRIT OF ERROR, which was argued in the Court of King's Bench, on Wednesday, the 8th February 1815: and on his being brought up in custody and placed at the bar of the Court,

See Maule v. Selwyns, Rep. B. R. Hilary Term 1815.

WILLIAMS, *for the prisoner*, contended, FIRST, That the indictment was defective, inasmuch as it ought to have expressly averred that each of the nine bank-notes was of the

(*a*) It is no objection to the indictment, that the punishment for one of the offences therein charged is *positive*, and for the other discretionary. Rex *v.* Hill Darley, 4 East's Rep. 174.

(*b*) An indictment for burglary, charging in one count an intent *to steal* the goods of the owner, and in another, with intent *to murder* him, is good; for it is the same fact and evidence, only laid in different ways. Rex *v.* Thompson, *Norfolk* Summer Assizes 1781. 2 East's P. C. 515.

(*c*) "If," says Mr. Starkie, "several felonies be charged against a prisoner in the same indictment, it is no objection, either upon demurrer or in arrest of judgment; for, on the face of an indictment, every distinct

1814.

JOHNSON'S CASE.

value of one pound; for that the charge of his having received "divers, TO WIT, nine *bank-notes* for the payment of "divers sums of money, amounting in the whole to a certain "sum of money, TO WIT, the sum of nine pounds of lawful "money, and of the value of nine pounds, &c." was not sufficient: that it had been determined in the case of *Symmons* v. *Knox* (1), that where any thing is laid under a *videlicet*, the party is not concluded by it; as he is, where there is no *videlicet*; that the case of *Grimwood* v. *Barrett* (2), shewed that where an averment is material, the addition of a *videlicet* does not render it immaterial, but that it is as traversable, in such case, as if the *videlicet* had not been inserted; and he contended that the averment that each note was of the value of one pound was a material averment, and that unless it were proved at the trial that the prisoner had received some one of the said notes, he ought to have been acquitted. He also cited *Rex* v. *M'Gregor* (3), to shew that all the rules required at common law, in describing the offence of larceny, must be strictly pursued in an indictment on the 39 Geo. III. c. 85; and that from 2 *Hale, P. C.* 182. 2 *Hawk. c.* 25. *s.* 74; and 560. *Staund. P. C. c.* 31. *s.* 96. 5 *Co. Rep.* 36. it was clear that the want of a direct allegation of any thing material in the description of the substance, nature or manner of the crime cannot be supplied by any intendment or implication whatsoever.

(1) 3 Term Rep. 68.

(2) 6 Term Rep. 462.

(3) *Ante*, page 932.

SECONDLY, he contended that the indictment was defective, inasmuch as it did not contain any positive allegation that the notes were the property of the trustees *at the time* when the

count imports to be for a different offence. But if it appear, before the defendant has pleaded, or the Jury are charged, that he is to be tried for separate offences, it has been the practice for Judges to quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in his challenge of the Jury; for he might object to a Juryman trying one of the offences, though he might not object to his trying the other.

But if the joinder of two distinct felonies be not discovered before the prisoner has pleaded, the Court, in its discretion, may put the prosecutor to elect on which he will proceed." 1 Starkie's C. P. page 36. for which he cites Rex *v.* Kingston, 8 East's Rep. 41. 2 East's P. C. 8. 26, 27. 3 Term Rep. 106. Rex *v.* Jones, 2 Campb. Rep. 132.

1814.

JOHNSON'S CASE.

offence is charged to have been committed, or that the prisoner had been guilty of a larceny in so receiving them. The charge is, that the prisoner received the notes "for and on account of the said trustees; and that having so received them into his possession, for and on account of his said employers, he afterward, to wit, &c. fraudulently and feloniously *embezzled and secreted the same;* AND SO THE JURORS SAY, that he did, *in manner and form aforesaid*, feloniously, steal, take, and carry away, the said bank-notes from his said employers, the said bank-notes being *then and there* the property of the said trustees, on whose account the same were received by, and taken into the possession of, the said *Joseph Johnson*, so employed as aforesaid." This he contended was not sufficient, according to the opinion of the Judges in *M'Gregor's Case* (1), for that on this statute the indictment must contain all the averments that are necessary to constitute a complete, and correct charge of the offence of *larceny* at common law; that every material allegation must appear, in its proper place, in the body of the indictment; that the words descriptive of the larceny at common law ought to have been inserted before the words "and so the Jurors say," &c.; that the allegation "*in manner and form aforesaid*" renders the previous description necessary, which description, in this case, is not of A LARCENY, but merely of *embezzling and secreting*, without superadding, as it ought to have done, the common law description of larceny; that as it now stands there is no *substantive allegation* of the common law offence, for that the subsequent finding of the Jury that he did "steal, take, and carry away the said notes" is a mere *conclusion of law* not supported by the premises; and he cited 2 *Hale*, 168. and 4 *Co. Rep.* 4. to shew that an indictment founded on a statute, must, by express words, bring the offence within the substantial description of it, and that the circumstances necessary to constitute a description of the offence, cannot be supplied by the general conclusion.

(1) *Ante*, 932.

THIRDLY, he contended that there was a *misjoinder* of counts in the indictment; for that the same judgment could not be given on the count for the larceny, on 2 Geo. II. c. 25. for stealing the notes, and on the count for embezzling them, on 39 Geo. III. c. 85; the former statute making the

1814.

JOHNSON'S CASE.

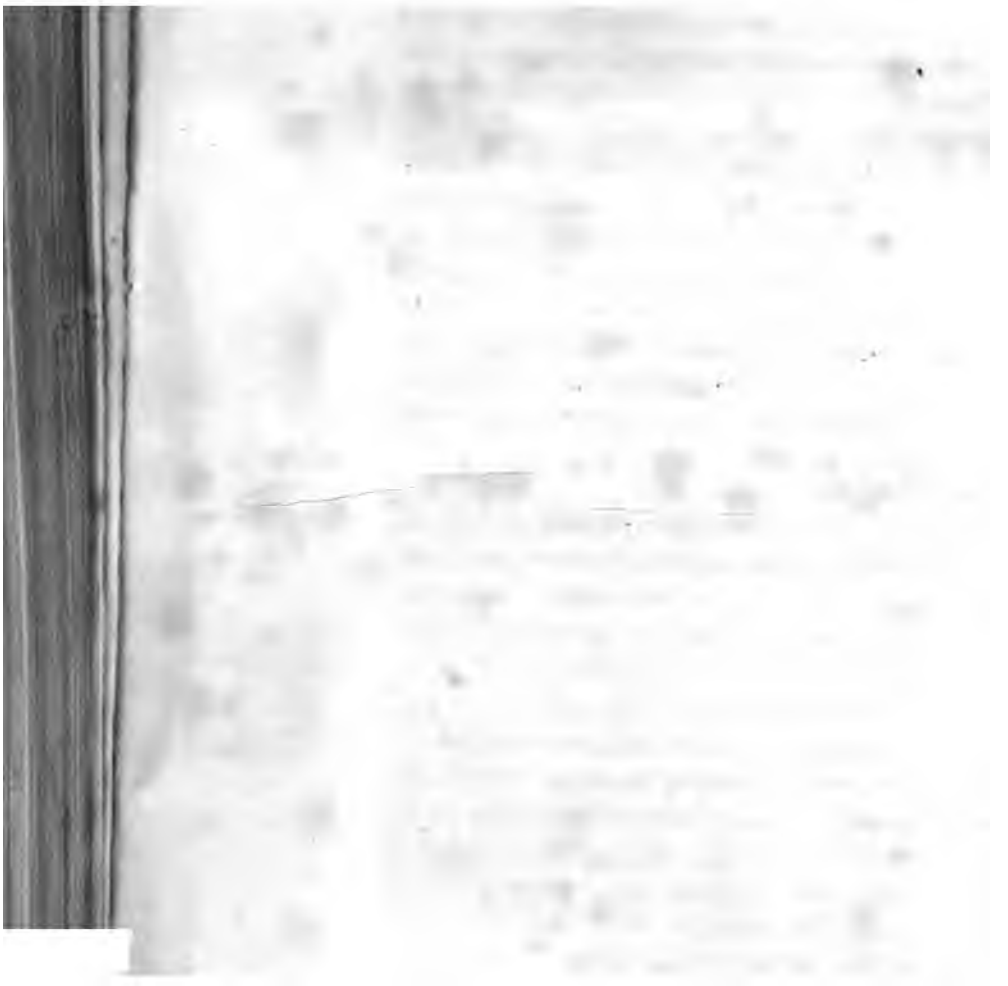
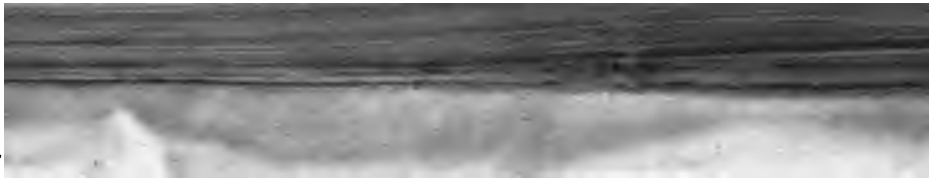
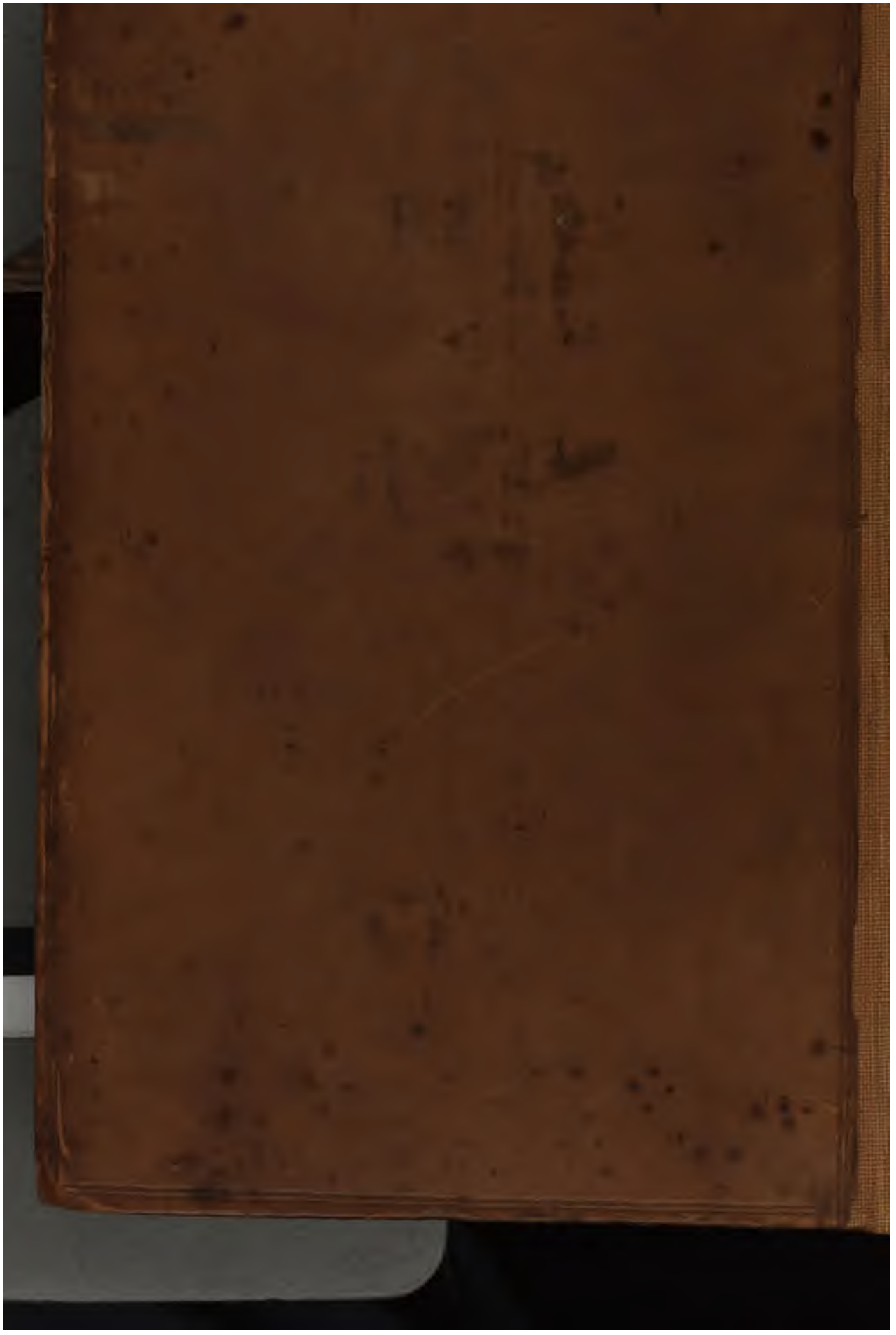
offence thereby prohibited a felony, but the latter inflicting a greater punishment of transportation for fourteen years, without giving any denomination to the offence; that a prisoner convicted upon the 39 Geo. III. c. 85. was not therefore bound to pray his clergy, and which if he refused or neglected to do, the only punishment he was liable to was *transportation*; but that if a convict on the 2 Geo. II. c. 25. were so to neglect his prayer of clergy, he might have judgment of death.

CLARKE, *for the Crown*, contended, FIRST, that the statute 2 Geo. II. c. 25. had put bank-notes, which, at common law, were mere *choses in action*, upon the same footing as goods and chattels of every kind, and that the statement of their value in an indictment was no otherwise necessary than to shew whether the offence of stealing them amounted to grand or to petty larceny. SECONDLY, that it was sufficient for the purpose of a legal charge to state their number and value; for that their more particular description was rather matter of evidence than of charge. THIRDLY, as to the supposed *misjoinder*, it was every day's practice to join petty treason and murder in the same indictment, yet the judgments to be given in those offences were quite distinct and different from each other. 2 *Hale*, 397.

See R. v. Radburne, *ante*, page 457.

Lord Ellenborough, C. J.
Mr. Justice Le Blanc.
Mr. Justice Bayley.

THE COURT were of opinion that the description in the indictment being "bank-notes for the payment of money," was sufficient; that the statute 39 Geo. III. c. 85. had been properly pursued in all its material allegations; and that *the joinder* in the counts of an offence on the 2 Geo. II. c. 25. and the 39 Geo. III. c. 85. was correct, for that each of these statutes made the respective offences therein described felony; that it was in both cases equally necessary for the convict to pray his clergy; the only object of the latter statute being to enlarge the seven years' transportation inflicted on the common law offence, to fourteen years' transportation for an offence within the statute.

END OF THE SECOND VOLUME.

S. WOODFALL, PRINTER, ANGEL COURT, SKINNER STREET, LONDON.